DOCKET

No. 86-1904-CSY
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Title: Arizona, Petitioner
v.
Larry Youngblood

Docketed:
May 26, 1987

Court: Court of Appeals of Arizona,
Division Two

Counsel for petitioner: Howard,James M.

Counsel for respondent: Davis,Daniel F.

Entry	Date	Note	Proceedings and Orders
1	May 26 1987	G	Petition for writ of certiorari filed.
2	Jun 25 1987		Brief of respondent Larry Youngblood in opposition filed.
3	Jun 30 1987		DISTRIBUTED. September 29, 1986
4	Jun 30 1987		REDISTRIBUTED. September 28, 1987
6	Feb 22 1988		REDISTRIBUTED. February 26, 1988
7	Feb 29 1988		Petition GRANTED.
			**********
11	Apr 14 1988		Order extending time to file brief of petitioner on the merits until April 23, 1988.
8	Apr 19 1988	G	Motion of petitioner to dispense with printing the joint appendix filed.
9	Apr 22 1988		Brief of petitioner Arizona filed.
12	May 2 1988		Motion of petitioner to dispense with printing the joint appendix GRANTED.
13	May 20 1988		Record filed.
		*	Certified original record, box, received.
14	May 25 1988		Brief of respondent Larry Youngblood filed.
15	Jun 23 1988		CIRCULATED.
16	Jul 15 1988		Set for argument. Tuesday, October 11, 1988. (3rd case) (1 hr.)
17	Oct 11 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86 1904

Supreme Court, U.S.
FILED
MAY 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE OF ARIZONA,
Petitioner,

-vs-

LARRY YOUNGBLOOD,

Respondent,

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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143pp

QUESTION PRESENTED

DOES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRE DISMISSAL OF A CONVICTION FOR THE FAILURE OF THE STATE TO EMPLOY STATE-OF-THE-ART TECHNOLOGY TO PRESERVE AND TO TEST BODILY FLUID SAMPLES OF A SEXUAL ASSAILANT WITHOUT A SHOWING THAT THE SAMPLES MEET THE MATERIALITY STANDARD OF TROMBETTA V. CALIFORNIA?

EDITOR'S NOTE:

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OPINION BELOW

The opinion of the Arizona Court of Appeals, Division Two, is reported at ___ Ariz. ___, 734 P.2d 592 (Ariz. App. 1987), and is appended here as Appendix A. The order of the Arizona Supreme Court denying review is appended as appendix B.

STATEMENT OF JURSIDICTION

The opinion of the Arizona Court of Appeals which the State ask this court to review was entered on October 2, 1986. The Arizona Supreme Court denied the State's petition for review on March 27, 1987. This petition is filed within 60 days from that denial, on or before May 26, 1987. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

On October 29, 1983, ten year old David was kidnapped and sodomized by the Respondent, Larry Youngblood. The boy was forced into a car and driven to a secluded area where he was fondled and molested. Youngblood then took the boy to a house where he sodomized him four times. After finishing his assaults, Youngblood had the boy wash up in the bathroom and then dropped the boy off where had he found him. Eventually, the boy made his way home and was taken to a hospital by his mother.

At the hospital the boy was treated by a physician for rectal injuries. The treating physician also used a "sexual assault kit", a kit employed to collect seminal fluid deposited by sexual assailants. The physician used a Q-tip like swab and

swabbed the boy's rectum. The sexual assault kit, with the rectal swab, was given to police. The police placed it in a refrigerator at the police station, where it was frozen. (C27, D23)*. Police also obtained the boy's underwear and shirt. The clothes were not refrigerated.

On November 8, 1983, Edward Heller, a police criminalist, examined a smear from the rectal swab under a microscope to determine if there was spermatozoa present. (C7-C8, C23). The criminalist found spermatozoa present but only found several spermatozoa on the entire microscope slide. (D20, D35). The criminalist did not attempt to determine the amount of semen on the swab because at that time, the new technique

*References are to Appendix pages. Appendix C is the testimony of the police criminalist and Appendix D is the testimony of the defense criminalist.

for doing this (a P-30 protein quantitative analysis) was not in practice at the lab. (C9, C33, C34). The clothing was not tested at this time.

On December 7, 1983, Youngblood was indicted for the offenses of kidnapping, child molestation and sexual assault. On April 3, 1984, defense counsel filed a motion claiming that Youngblood was a chronic schrizophrenic and requesting that his competency to stand trial be examined. A trial date was not set pending psychiatric examinations. On August 27, 1984, the trial court found Youngblood competent and set the matter for trial.

On October 12, 1984, the State moved the trial court to order Youngblood to give blood and saliva samples for comparison with the sexual assault kit. The motion was denied on October 15,

1981, because no showing could be made that a valid comparison could be made with the sexual assault kit. Youngblood never was required to give to the State samples of his blood or saliva.

On October 15, 1984, the police criminalist again examined the refrigerated rectal swab sample. This time the criminalist performed an ABO blood group test on the minute sample in an effort to determine the assailant's blood type. (C10-C11). The test results indicated that no blood group substances were detectable in the rectal sample. (C11). The criminalist explained it was unusual to get detectable blood group substance results from rectal swab samples because of the small amount of semen present on the rectal swabs. (C11, C18-19, C41). He testified that only in about 10% of tests on rectal swabs is

sperm found to be present. (C18, C41).

In approximately January, 1985, the police began using the new P-30 protein quantitative analysis technique. (C15, 16, 33). This technique is based upon the presence of the P-30 protein molecule that exists exclusively in semen. (D5). The protein molecule was discovered to exist in 1977 or 1978. (C34, D14). In 1985 only a little over half the crime labs in the country had become capable of performing this test. (D15). Based upon the amount of the P-30 protein present, an estimate of the quantity of semen present can be made (D10). As the new P-30 protein test became available, the criminalist tested the clothing. The P-30 protein test on the clothing showed a very small quantity of semen present on the clothing. (C16-17). The criminalist also tested

the clothing, as he had the rectal swab, for ABO blood group substances. (C16-17, 30). The criminalist, based upon the P-30 protein test, found that the failure to find blood group substances was due to there being not enough semen present on the clothing. (C17-18, 30-32).

At trial the police criminalist testified about his examination of the "sex crimes kit" and victim's clothing. He admitted that he had not run the P-30 protein analysis on the swabs, but stated that the test could still be done. (Id. at 201-04).

The defense presented testimony from another criminalist, Keith Inman, in an attempt to inject doubt about the identity of the assailant. This man did not examine the "sex crimes kit" or the victim's clothing. He made no attempt to perform any analysis of either. He did

test samples of the Defendant's blood and saliva and concluded that the Defendant was a blood type A secreter. (D20-D21). Both the defense criminalist and the police criminalist agree that there are two possible alternatives that can be inferred from the ABO test results. These alternatives are:

(a) There was not enough semen in the sample to get a valid test result; or

(b) The semen donor is a nonsecreter, a person whose blood type is not secreted into his body fluid. (C28-29, D22-D23, D36). The defense criminalist testified in a general way about the effect of time and temperature on the reliability of ABO blood group test and P-30 protein quantitive analysis. (D15-D18). He testified that he felt either alternative was possible (D24); that even if the State had done a

quantitative test on the semen samples and found a large enough quantity to do an ABO blood group test, the results might still be equivocal. (D39-D40).

The defense criminalist also testified about other tests. One of the other tests was the acid phosphatase test which also quantifies the amount of semen in a sample. He testified that the acid phosphatase level in semen is fairly stable for years in the dried state even though it may lose some activity. (D16).

The last test which the defense criminalist spoke generally about was the PGM enzyme test. The PGM test identifies a genetic marker, other than blood type. (D7, D9). The secreter-nonsecreter status has nothing to do with PGM test results. (D11-D12). Every person's PGM

type is also present in his bodily fluids. The defense criminalist did not identify the Repondent's PGM type. If the semen sample is too diluted, the PGM will not be accurate. (D11).

The trial judge gave the following defense requested instruction:

> If you find that the State has destroyed or lost, caused to be destroyed or lost or allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest.

(R.T. of Feb. 8, 1985, at 90). Defense counsel argued that instruction in closing argument. The jury resolved the factual questions concerning the testing and the identification of the assailant. On February 8, 1986, the jury convicted the Respondent of all three charges. On appeal, the Respondent claimed that the

charges should have been dismissed. The Arizona Court of Appeals found that the State's testing and preservation of the semen samples was improper, requiring the dismissal of all charges. State v. Youngblood, ___ Ariz. ___, 734 P.2d 592 (App. 1986). (Attached as Appendix A). The Arizona Supreme Court denied review.

The State of Arizona respectfully requests the United States Supreme Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Review should be granted to clarify and decide important recurring constitutional issues presented by apparently conflicting interpretations of this court's unanimous opinion in Trombetta v. California, 467 U.S. 479 (1984). Trombetta held that the States were obligated to preserve for the defense only evidence that meets the constitutional standard of materiality. Confusion exists over the standard of constitutional materiality where the evidence may or may not be exculpatory.

Two separate interpretations are given to the very same passage in Trombetta:

> Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, see United States v. Agurs, 427 US, at 109-110, 49 L Ed 2d 342, 96 S Ct 2392, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

462 U.S. at 488-89. (Emphasis added).

The first interpretation reads Trombetta to mean that the possibility that the destroyed evidence was exculpatory is sufficient to meet the materiality standard. State v. Youngblood, ___ Ariz. ___, 734 P.2d 592 (App. 1986) (attached as Appendix A); State v. Escalante, ___ Ariz. ___, 734 P.2d 597 (App. 1986); State v. Bauer, 123 Wis. 2d 444, 368 N.W. 2d 59 (App. 1985) vacated on other grounds, 127 Wis. 2d

125, 377 N.W. 2d 175 (1985). This interpretation focuses upon the "might be expected to play a significant role" language of Trombetta.

The second interpretation reads Trombetta to mean that the mere possibility or speculation that the destroyed evidence was exculpatory is insufficient to meet the constitutional standard of materiality. United States v. Pinker, 795 F.2d 1218 (5th Cir. 1986); United States v. Fletcher, 801 F.2d 122 (10th Cir. 1986); United States v. Webster, 750 F.2d 307 (5th Cir. 1984). This interpretation relies upon the "must . . . possess an exculpatory value that was apparent" holding. Criminal convictions are dismissed or not dismissed solely on the basis of which interpretation is given to Trombetta.

The "possibly exculpatory"

standard is a false interpretation of Trombetta. The courts that misapply the holding of Trombetta do so by relying on cases wherein other courts have applied Brady v. Maryland, 373 U.S. 83 (1963) to the destruction of evidence. These Brady- based cases all precede the pronouncement of a constitutional standard of materiality, apparent exculpatory value, as set forth in Trombetta.

In Trombetta this court reviewed Brady and the other "access to evidence" cases, 467 U.S. at 485-86, and found that this court had never "squarely addressed the government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants". 467 U.S. at 486. This court then preceded to address this issue and established the standard of apparent exculpability. 467 U.S. at

489. To meet this standard the evidence must "possess an exculpatory value that was apparent before it was destroyed". Trombetta, 467 U.S. at 489.

Trombetta did not adopt the "possibily exculapatory" standard which is often extrapolated from Brady. In Trombetta this court reversed the state court decision that had followed a Brady-based framework. 467 U.S. 483-84, footnote 5. Trombetta is a rejection of the "possibly exculpatory" standard and an adoption of the "apparent exculpatory" standard. A possibility or speculation is insufficient to establish this constitutional standard of materiality. To meet this standard the evidence must "possess an exculpatory value that was apparent before it was destroyed". Trombetta, 467 U.S at 489.

The Arizona Court of Appeals,

Division Two clearly misinterpreted Trombetta to require only a possibility of exculpatory value. The court adopted the erroneous holding of a different division of that court in State v. Escalante, ___ Ariz. ____, 734 P.2d 597, 603 (App. 1987). This holding misconstrues the law which requires a demonstration of materiality into a law which requires only speculation and a demonstration of immateriality:

> We therefore rule that when identity is an issue at trial and the police permit the destruction of evidence that could eliminate a defendant as the perpetrator, such loss is material to the defense and is a denial of due process. Dismissal is the appropriate remedy unless the evidence against the defendant is so strong that a court can say beyond a reasonable doubt that the destroyed evidence would not have proved exonerating,

(Emphasis added, Appendix A at A-21-22 quoting State v. Escalante, supra.)

To the same effect is State v. Bauer, 123 Wis. 2d 444, 368 N.W. 2d 59 (App. 1985), vacated on other grounds, 127 Wis. 2d 125, 377 N.W. 2d 175 (1985), which cited the passage from Trombetta and required the defense to make only a "plausible showing" of how the evidence could be exculpatory. The court required the state to preserve evidence that was "possibly exculpatory" and placed the burden on the state to show by clear and convincing evidence that lost evidence was not exculpatory. These courts have transformed Trombetta's requirement of "apparent" exculpability to mean "apparently exculpatory" which means "possibly exculpatory". These courts have turned the law on its head.

The Arizona Court of Appeals

incorrectly dismissed the convictions upon mere speculation. The State obtained extremely small samples of the seminal fluid deposited by the sexual assailant. The police criminalist tested the samples and found no blood-type grouping. The State's evidence showed that this was due to inability to test such small samples. The defense performed no tests of its own but countered only with speculation. The defense speculated about what tests were not performed. The defense also speculated about possible deterioration of the samples. The Respondent did not have the tests performed because further testing could prove inculpatory. Instead, the Respondent complained about the State's failure to do the testing. This is insufficient to meet the standard of materiality.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted this 26th day of May, 1987.

STEPHEN D. NEELY
DEPUTY COUNTY ATTORNEY

James M. Howard
Chief Deputy County Attorney

John R. Gustafson
Deputy County Attorney

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISON TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 3979
Appellee,	)	2 CA-CR 4364-2
	)	(Consolidated)
v.	)	Department B
	)	
LARRY YOUNGBLOOD,	)	O P I N I O N
	)	
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-12316

Honorable J. Richard Hannah, Judge

REVERSED

Robert K. Corbin, The Attorney General
Phoenix
by William J. Schafer III
and Gerald R. Grant — Attorneys for Appellee

Daniel F. Davis
Tucson — Attorney for Appellant

L A C A G N I N A, Judge

Larry Youngblood appeals his jury convictions for molestation of a child, sexual assault and kidnapping, with a prior conviction, and the court's imposition of presumptive concurrent 10.5-year prison terms. His defenses to the charges were misidentification and nonpresence. Youngblood argues that the convictions should be reversed and the case against him dismissed because the state failed to adequately preserve certain physical evidence and disposed of other evidence in violation of his due process rights. We agree with Youngblood's arguments and reverse.

THE INCIDENT

David, the ten-year-old victim, had left a church service he was attending with his mother around 9:30 p.m. on the night of October 29, 1983,

and had gone to a nearby carnival where he was approached by a middle-aged black man of medium height and weight. David, described as a very observant youngster, testified that his assailant was a black man named Damian or Carl who had greasy grey hair, facial hair, no facial scars, and whose right eye, to David's best recollection, was almost completely white. His assailant wore brown leather or plastic loafers and drove a white, medium-sized, two-door sedan with a passenger door that did not work. The evidence established that Larry Youngblood is a thirty-year old black male who has dry black hair, a scar on his forehead and a bad left eye. He wears cloth-laced shoes and walks with a noticeable limp due to a foot injury received in an automobile accident when he was a child. He always wears glasses

in public.

After attempting to persuade David to get into the car, the assailant grabbed him, threw him into the car and held him by his hair, continually pushing his head down on the floorboard, while driving away. Country music was playing on the radio. At some point, the assailant stopped the car near a ravine or wash and fondled and molested David. He then took David to an unidentified, sparsely furnished house where he sodomized him four times. He threatened to kill David if David told anyone about the incident. He also told David during the acts of anal intercourse that David was "too small,", that the assailant had done this with his nephew so many times that his nephew's anus "was already stretched out." Later, he used a jumper cable to start the car and returned David

to the carnival. The episode lasted about an hour and a half.

THE SAMPLES

David was taken to Kino Hospital. Hospital personnel used a sexual assault kit to preserve evidence of the molestation. The kit included a tube for collecting a blood sample, a paper to collect a saliva sample, microscopic slides used to make smears (for female victims) and a set of swabs used to collect evidence. In this case, rectal and throat smears were made, and samples of the victim's blood and saliva were taken. The state's criminalist found evidence of semen present on the rectal smear. He did not attempt to quantify the amount of semen on the swab until a year after the assault had occurred. At that point he found no blood group substances on the swabs.

In addition, David's clothing was taken as evidence. The clothing was never refrigerated, and no testing was done until 15 months after the assault. Semen was found on the clothing, but no blood group substances were found on the underwear or the tee shirt stains. Samples of David's hair were taken to compare with any evidence found in Youngblood's car.

THE CAR

David described the assailant's car as a medium-sized, two-door sedan with a trashy interior and a noisy muffler. He testified that the car started with an ordinary ignition key. He also testifed that there were blankets or sheets on the seats of the car but that he was not able to see them because the car was dark. The car radio was playing country music. The assailant

told David the right passenger door did not work. About a month following the assault, David was brought to the police station to look at two blankets which he was told were taken from the assailant's car. Without touching them, he identified the blankets as those which were in the car.

Six weeks following the assault, the police seized Larry Youngblood's 1964 white, four-door Chrysler Imperial from the home of Alice Whigham, his former girlfriend, took it from her back yard where it was inside a chained gate, towed it to the station, took pictures of the car and dusted it for fingerprints. It was also examined for clothing and hair fibers. Because Youngblood had not transferred title to his name when he acquired the car, the police disposed of the vehicle without notice to Youngblood

or defense counsel. Prior to this time, they did not determine whether the radio worked, if the ignition switch worked with a key, what channel the radio was tuned to, if the muffler was noisy, or indeed whether the car was running at all.

Youngblood and others testified that his car was not running at the time of the incident because of electrical problems and because it needed other repairs. He further testified that he had removed the battery from his car to put in Alice Whigham's car. The car ran quietly when it was functioning and did not start with a key but with a screwdriver. The radio had not worked at all since he owned the car. The examination of the car failed to reveal any fingerprints, hair or clothing fibers from David; the only fingerprints were those of Youngblood.

THE IDENTIFICATION

Nine days after the assault, a police detective came to David's school, took a taped statement from him, told him they had arrested the man who raped him, and asked him to pick the assailant out of a photographic lineup. Three of the photographs had the left eye whited out, and three had the right eye whited out. David's optometrist testifed at trial that David had an astigmatism and "was instructed to wear glasses whenever he was in school [or] doing close work, [or watching] T.V." He was not wearing glasses the night of the incident nor when he first viewed the photographic lineup. After looking at the pictures by holding them very close to his face, David picked Youngblood as his assailant, saying he was "pretty sure." Later, David identified another man in the

lineup as the possible assailant.

THE ALIBI

Alice Whigham testified that on the night of the assault she had been at her mother's house until 9:30 p.m. preparing for her sister's birthday. When she returned home, the 10:00 o'clock news was coming on the television, and Youngblood was asleep on the living room sofa. Her house is a 30 to 45 minute drive from the place where David was abducted. The police interviewed Whigham four or five weeks after the incident. They woke her up at 4:00 a.m. and began asking her if she knew where Larry had been "around Halloween." She responded that he was not with her that night, but that he was living there at the time. When Whigham later learned the actual date of the incident, she made several calls to the police department and

defense counsel to tell them that Youngblood had been with her that night. Those calls were never returned. Youngblood testified that he was living with Alice at the time of the incident.

SANCTIONS FOR DESTRUCTIONS OF EVIDENCE

We have previously held that law enforcement officers have a duty to preserve semen samples in a sexual assault case, including a duty to refrigerate them. State v. Mitchell, 140 Ariz. 551, 683 P.2d 750 (App. 1984). The United States Supreme Court has held that the due process clause of the fourteenth amendment requires "that criminal defendants be afforded a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 484, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413, 419 (1984). This imposes a

"constitutional duty on the prosecution to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt." Id. Such evidence is considered material if its exculpatory value was apparent before the evidence was destroyed and is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Id. at ___, 104 S.Ct. at 2534, 81 L.Ed.2d at 422, citing United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

However, in Mitchell we concluded that the failure of the state to preserve the sample did not merit dismissal but only suppression of any bloodgrouping evidence, citing Scales v. City Court of City of Mesa, 122 Ariz. 231, 594 P.2d 97 (1979). We further held in Mitchell that the improper admission into evidence of

the bloodgrouping test results were harmless error beyond a reasonable doubt because of the overwhelming evidence against the defendant.

Since our decision in Mitchell, we have again considered what circumstances would warrant dismissal of a case for destruction of evidence. In State v. Pierson, 146 Ariz. 287, 705 P.2d 1338 (App. 1985), we stated:

> There is a difference between the destruction of physical evidence used in the commission of a crime and the destruction of statements by witnesses who are available for examination and cross-examination. The loss of physical evidence as in State v? Hannah, 120 Ariz. 1, 583 P.2d 888 (1978), with a clear showing of prejudice requires dismissal . . . .

146 Ariz. at 289, 705 P.2d at 1339. In Pierson, we found the accused had access

to the evidence in other forms and was able to cross-examine the witnesses concerning the evidence. Therefore, we concluded that Pierson suffered no prejudice. To the same effect was the Supreme Court's conclusion in Trombetta that the defendants were not "without alternative means of demonstrating their innocence." 104 S.Ct. at 2535. In Mitchell, we held that the state's failure to preserve the semen sample did not require dismissal because the results of the blood grouping test in that case could not have affected the verdict beyond a reasonable doubt. The results would not have shown that defendant was not the rapist. See also State v. Hauss, 142 Ariz. 159, 166, 688 P.2d 1051, 1058 (App. 1984).

Our decision in State v. Maldonado, 138 Ariz. 475, 675 P.2d 735

(App. 1983), and the Supreme Court decision in State v. Perez, 141 Ariz. 459, 687 P.2d 1214 (1984), also present fact situations which differ from the present case. In Maldonado, the loss of the victim's underpants prior to testing was ruled not prejudicial where the victim denied ejaculation and there was also no evidence of deterioration of the sample. In Perez, the lost evidence was a video tape of the robbery itself which the victim viewed prior to the photographic lineup. There was eyewitness testimony in that case, along with other photographic evidence of the robbery. As we stated in State v. Pierson, supra, the courts distinguish between physical evidence which is destroyed and the destruction of evidence for which witnesses are available for cross-examination. Additionally, the

accused in Perez had other evidence available from which to prove his innocence.

Other jurisdictions also require a specific showing of prejudice: the defendant must "establish a reasonable probability that the evidence could have been of assistance to the defense." People v. Janke, 720 P.2d 613, 615 (Colo. App. 1986). In Janke, the defendant argued that evidence consisting of semen on the victim's carseat was destroyed without testing and that destruction required dismissal. The court disagreed and concluded:

> Although no blood grouping test was performed on the specimen found on the carseat, a blood grouping test was performed on specimens taken from the victim's jeans, underwear, and vaginal swabs. Those tests results did not exclude defendant as a possible source of the semen; rather it identified a person of his blood type

> as being a possible source. In view of these results, defendant has failed to show a reasonable possibility of assistance to his case from the specimen on the carseat.

Id. (emphasis added).

In People v. Epps, 182 Cal. App. 3d 1102, 227 Cal.Rptr. 625, 628 (Cal.App. 5 Dist. 1986), where defendant was charged with murder and the "physical evidence and eyewitness testimony overwhelmingly established appellant as the perpetrator of this brutal and senseless murder," the court concluded there was no due process violation from the state's failure to perform a particular test:

> [T]he evidence has in fact analyzed, the results were helpful to appellant, and it is quite apparent that the trial court gave at least as much weight to the defense witnesses' extrapolation of the results of the analysis as would likely have

> been possible given an adequate sample for retesting. Quite simply put, appellant got as much mileage out of the evidence . . . as he could reasonably have expected, no matter how may experts analyzed the evidence.

227 Cal.Rptr at 634 (emphasis added).

In this case, the samples were not preserved. The tests were never performed. We cannot say beyond a reasonable doubt that had the samples been preserved and the tests performed and the results introduced into evidence, the jury still would have convicted Youngblood.

Both criminalists who testified in this case agreed that the P-30 test or the acid phosphate test might have exonerated Youngblood. The testing is done for two reasons: it verifies that sexual conduct has occurred and also

attempts to narrow the number or to exclude certain persons as suspects. The initial testing (ABO typing) on the rectal swab for blood grouping substances (found in certain persons who secrete the substances into their body fluids) showed that the criminalist was unable to find any blood group types. Both experts indicated that two equally possible alternatives would account for this. One was that the semen donor was a nonsecreter. That alternative would have eliminated Youngblood as the semen donor since he was analyzed and found to be an A secretor. The second alternative was at best neutral in relation to Youngblood's defense. It was that the secretor was of unknown blood type, because the sample was insufficient to determine the type. If the P-30 or the acid phosphate test had been performed,

and the results showed there was a sufficient quantity [sic] of semen, then Youngblood could have been excluded. Even if the test results did not completely exonerate Youngblood, the criminalist agreed that they would have "considerably diminished the population of possible semen donors."

The deterioration of the semen sample was caused by the state's inaction in two areas: 1) the inability to quantitatively test the rectal swab and 2) the failure to properly preserve the "better sample," the stains taken from the victim's clothing. As the evidence showed, the samples taken from the clothing would have contained more semen that the rectal swab because of "natural drainage and leakage." The testimony also showed that since samples on clothing dry more quickly, there would be

less chance for deterioration because of moisture. Additionally, there would be less contamination with either vaginal fluid or material from the rectum. The state's criminalist failed to refrigerate or freeze the clothing and failed to test the clothing for 15 months following the assault. When he ran the P-30 test, a quantitative test, he found the sample to be very small. He was also unable to determine any blood groupings.

There is no doubt that prejudice to Youngblood occurred as a result of the state's inability to properly preserve the evidence. We find that this is a case that requires dismissal and agree with the ruling of Divison One of this court in State v. Escalante, ____ Ariz. ____, 734, P.2d 597 (App. 1986), where the court stated:

> We therefore rule that when identity is an issue at trial and the police permit the destruction of evidence that could eliminate a defendant as the perpetrator, such loss is material to the defense and is a denial of due process. Dismissal is the appropriate remedy unless the evidence against the defendant is so strong that a court can say beyond a reasonable doubt that the destroyed evidence would not have proved exonerating.

___ Ariz. at __, 734 P.2d at 603.

This is not a case where the samples were available for defendant's examination, see State v. Wiley, 144 Ariz. 525, 538, 698 P.2d 1244, 1257 (1985), and the defense "fails in a timely fashion to avail itself of the evidence [such that] subsequent deterioration of the evidence attributable to the passage of time

cannot be said as a matter of law to be attributable to the prosecution." People v. Newsome, 136 Cal. App. 3d 992, 1000, 186 Cal.Rptr. 676, 684 (1982). It is a case where "tests were not made which could have been made and . . . it cannot now be determined whether exculpatory evidence would have been developed." See State v. Hannah, 120 Ariz. 1, 2, 583 P.2d 888, 889 (1978).

In holding today that the state's action in failing to preserve the evidence requires dismissal, we do not imply any bad faith on the part of the state. Rather, we acknowledge the right of an accused to a fair trial: the dismissal is necessary in order to avoid an unfair trial, not as punishment for any inaction by the state. See Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1197, 10 L.Ed.2d 215 (1963). As the

California Supreme Court stated in People v. Nation, 26 Cal.3d 169, 176, 604 P.2d 1051, 1055, 161 Cal. Rptr. 299, 303 (1980):

> Thus, an analysis of the semen sample in the present case might have not only impeached the credibility of the prosecution's witnesses [citations omitted], but also might have completely exonerated the defendant. Whether or not the police deem the crime sufficiently important to warrant such an identification analysis, they cannot make this decision for the defendant. Accordingly, when a woman has been the victim of an attempted or actual rape and the police recover a semen sample of the assailant, the authorities must take reasonable measures to adequately preserve this evidence.
>
> Such a rule protects not only the due process rights of the defendant, but also society's interest in the integrity

> of the judicial system. The duty to preserve critical evidence enhances the reliability of the trial process: if an accused is convicted of rape when available evidence would have exonerated him, not only is he unjustly incarcerated but the actual rapist remains at large. 'Law enforcement has failed in its primary function and has left society unprotected from the depredations of an active criminal.' [citations omitted]. The duty of the prosecution is not simply to obtain convictions, but to "'fully and fairly present to the court the evidence material to the charge.'"

We reverse the convictions and sentences imposed and order dismissal of all counts against Youngblood. In view of our reversal based on the state's failure to preserve the physical evidence listed above, we need not fully address the question of the state's destruction

of other evidence (Youngblood's car) without notice to him. We note, however, that Rule 28.2(e), Ariz. R. Crim. P., 17 A.R.S., governing the disposition of evidence in the custody of the state following the adjudication of charges, State v. Superior Court, 127 Ariz. 175, 619 P.2d 3 (1980), requires 10 days' notice "to any person, and his counsel against whom the item has been or may be used as evidence." The parties' stipulation that the car was impounded, later released to the towing company and then dismantled and sold because the registered owner did not claim it, does not affect Youngblood's right to notice under Rule 28.2. The exculpatory nature of the evidence in the car is clear: it would have corroborated several witnesses' statements and greatly strengthened Youngblood's defense of

misidentification.

Reversed.

MICHAEL A. LACAGNINA, Judge

CONCURRING:

BEN C. BIRDSALL, Judge

JOSEPH M. LIVERMORE, Presiding Judge

APPENDIX B

SUPREME COURT OF ARIZONA

STATE OF ARIZONA	)	
	)	
Appellee,	)	Supreme Court
	)	No. CR-86-0361-PR
v.	)	
	)	Court of Appeals
LARRY YOUNGBLOOD,	)	No. 2 CA-CR 3979
	)	and 2 CA-CR 4364-2
Appellant.	)	(Consol)
	)	
	)	O R D E R

ORDERED: That the order of February 24, 1987, granting petition for review is vacated as being improvidently granted.

FURTHER ORDERED: That the petition for review is denied.

DATED this 27th day of March, 1987.

FRANK X. GORDON, JR.
Chief Justice

TO: Hon. Robert K. Corbin,
Attorney General ATTN:
William J. Schafer III, Esq.
and Gerald R. Grant, Esq.
Daniel F. Davis, Esq.
Larry Youngblood, Arizona State Prison
Stephen D. Neely, Pima County Attorney
Hon. J. Richard Hannah, Pima County Superior Court
James N. Corbett, Clerk, Pima County Superior Court Clerk
Joyce Goldsmith, Clerk, Court of Appeals, Division Two

dgw

APPENDIX C

EDWARD HELLER,

being duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. WARD:

Q. State your name, please.

A. Edward Heller.

Q. Mr. Heller, what do you do for a living?

A. I'm employed as a criminalist for the Tucson Police Department crime laboratory.

Q. How long have you been with the Tucson Police Department Crime Laboratory.

A. About four and a half years.

Q. All right. What are your duties and responsibilities generally as a criminalist for TPD?

A. Well, primarily I'm

responsible for the analysis of physical evidence coming into the crime laboratory that's in an area call serology. This includes examinations of blood, semen, saliva and other body fluids.

And I would say about ninety percent of my time is spent doing examinations of that type of evidence.

Q. All right. Mr. Heller, could you give the jury an idea of your educational background?

A. I received my Bachelor of Science degree in forensic science from the University of New Haven.

Since that time I've also received training through my employers.

I was employed with the Houston Police Department Crime Laboratory in Houston, Texas, for approximately two years before coming here to Tucson.

I've received training from the FBI Academy in Quantico, Virginia, and I've also received training at the Serological Research Institute in Emeryville, California.

Q. All right. Mr. Heller, serology then is the study of body fluids?

A. Forensic serology, yes. It's the study of body fluids: Blood, semen, saliva, gastric fluid, vaginal fluid, fecal material.

Q. All right. Forensic, what does that word mean?

A. Well, forensic science is the study of the physical and natural sciences as it applies to law. It's where you use the various sciences and you apply them to legal matters and criminalistics is the actual field that I'm working in.

Q. Mr. Heller, were you employed

by the Tucson Police Department Crime Lab back in November of 1983?

A. Yes, I was.

Q. In what capacity were you then employed?

A. As a criminalist.

Q. Did you have occasion to be requested to do some studies involving a case against a defendant by the name of Larry Youngblood?

A. Yes, I did.

Q. All right. Can you tell the jury how you receive these requests and what they consist of?

A. Well, I receive requests two ways: From the County Attorney's office to do an examination of a particular case, or from a sex crimes detective, which is the usual route if this is a sexual assault, I'm required to do analysis on certain physical evidence.

Q. Are you familiar with a sexual assault kit?

A. Yes, I am.

Q. Can you explain to the jury just what a sexual assault kit is and what it contains?

A. Okay. All the area hospitals have what are called sexual assault kits. What happens when a victim is sexually assaulted, they are transported to the hospital and the examination kit is used by the doctors in the hospital to take physical evidence from that person. It includes a tube for collecting a blood sample. There is a small piece of paper or filter paper. It's used to collect a saliva sample.

There's smears which are just microscope slides in the kit. These are used to make smears from a female victim. It would be a vaginal smear or

rectal smear or oral smear is made on a microscope slide.

There is a set of swabs in this that are used to collect the evidence. There is also some containers for hairs and fibers if they're found and also collected known sample from the victim.

There is also a medical examination report that's in the kit.

This is all in a sealed, white, manila type folder or envelope.

And the hospital fills out all the information as they do the examination.

Q. All right. Mr. Heller, I would like to hand to you what's been marked for identification as State's Exhibit 19 and ask you if you can identify that.

A. This is a Tucson Police

Department sexual assault kit and my initials and the date that I worked the kit are on the back where I sealed it.

Q. All right. That particular kit concerns which victim?

A. David Leon.

Q. All right. Mr. Heller, you did receive a request to do some laboratory analysis concerning this case?

A. That is correct.

Q. All right. Can you tell the jury what you did and how you proceeded?

A. Okay. The analysis of the kit consisted of examination of two smears that were in the kit. These are the microscope slides. Simply the smears are just placed under a microscope and I'm looking for the presence of any sperm to establish the presence of semen.

On the rectal smear, I found spermatazoa present.

On the smear that was labeled throat, I did not find any sperm present.

That was the nature of my examination as far as the smears.

I as a routine type the victim's blood. He was group O and the saliva sample was stored in the laboratory at the time.

So my primary examination at this time was just to identify whether or not there was any semen present and there was on the rectal smear.

Q. All right. So it was just, that's the first level in your analysis is to find out whether or not in fact there was semen present?

A. That's correct.

Q. And in David's case, you did find semen present on the rectal smear?

A. Yes.

Q. And that indicates that in

fact someone did ejaculate in or about his rectum?

A. That's correct.

Q. Now, did you try to quantitate the amount of semen that was found on that swab?

A. No, I did not.

Q. Why not?

A. At this particular time, the technique was not in practice in our laboratory.

Q. Is this a technique that can quantitate?

A. Well, yes. There's some recent developments in the field. We can try to approximate it. I wouldn't say it's totally specific for quantitation of semen, but we can get an approximation of how much semen is in the stain so we can do some additional analysis of the stain and try to individualize that semen stain

a little bit better.

Q. All right. Is there a name for this test?

A. Well, it's dealing with the quantitation of a protein called P-30 which is a constituent of semen.

Q. So it's sort of generally referred to as a P-30 quantitative?

A. Analysis.

Q. All right. Now, in this case as far as the rectal swab, you did not do a P-30 type test to quantitate?

A. That's correct.

Q. Did you try to analyze further at a later date, that is, as you said to further try to identify the constituents in that semen in that fluid?

A. Well, yes. I did at a later date. Actually the next year, October 15th, 1984, I did an examination of the semen found on the swabs. Well, the

swabs are used to make the smears. So I examined the swabs to try to individualize that semen stain.

What I mean by that is there are certain individuals who secrete their blood group substances in their body fluids. These are called secreters. Just like their blood type might be A, they also have that constituent in other body fluids like semen. So it's possible to go ahead and type the semen stain.

There are also enzymes that are secreted in the semen themselves so we can try to individualize a particular enzyme to a particular person.

In this instance here, I was just doing the what's called ABH typing looking for the blood group substances, and I did not find any blood group substances on the swabs from the assault kit.

Q. All right. Now, you sort of explained it. When you try to find blood group type substances, do you need a certain amount of semen before you can get a reliable test result?

A. Right. Well, yes. There is not as I would say a cutoff point. It's very relative.

But you do need a certain amount of stain there before you can find blood group substances. It can be diluted using a figure of approximately one in four hundred as a dilution of the semen stain. If it's diluted any more than that, the chances of finding blood group substances or enzymes is rather remote.

So the more concentrated the stain is, the greater the likelihood of finding blood group substances.

Q. The fact that you were unable

to find blood group substances in the semen that was found in the sample from David, does that indicate anything? Is that dispositive of anything?

A. Well, what it does is I mentioned there are people who are called secreters and they secrete these blood group substances into their body fluids.

There is also another group of people that are called nonsecreters. These people do not secret any blood group substances into their semen or any of their body fluids.

Therefore, when you get the test result that indicates that you do not find any blood group substance, in this instance I don't know whether that's because there just was not enough semen present there or the individual who deposited that semen, the semen donor, is a nonsecreter.

So I can't make that differentiation.

Q. So you can't come to any conclusion one way or the other as to whether or not it was a nonsecreter or you simply did not have enough of a sample?

A. That's correct.

Q. That's with regard to the sample that was taken from David's rectum?

A. That's correct.

Q. All right. Did you have occasion to test David's clothing at any time?

A. Yes, I did.

Q. All right. First explain to the jury why this was done.

A. Well, the examination of the clothing is kind of a two-part examination form. Again for any stains, biological stains such as blood and semen

samples, to collect any hairs or fibers that might be foreign to that particular material.

Q. All right. Now, in reference to David's clothing, did you perform some tests?

A. Yes, I did.

Q. All right. What were they?

A. Well, I did an examination for semen and I found semen present on -- there were stains on the rear of the pair of underwear and on the rear of a blue T-shirt that had a logo on the front of it.

I did not find any -- those are the two semen stains that I found.

At this point, this was an examination that was a recent examination done in January and we were doing P-30 analysis. So I performed a P-30 analysis of those semen stains and the levels that

were there indicated that there was a very small amount of semen present.

But the blood group substance testing was performed even, even though there was a small amount and there was no blood group substances found in either of the stains on the underwear or on the T-shirt.

There was also some hairs and fibers collected and they were placed into evidence.

Q. All right. Mr. Heller, the fact that you found semen on the underwear and T-shirt of David, that would indicate again that there was some kind of ejaculation; is that correct?

A. On the clothing, that's correct.

Q. On the clothes.

Then you said you took it further and you did a quantitative?

A. Right. I did the P-30 analysis.

Q All right. The P-30 analysis indicated that there was a very small amount?

A. That's correct.

Q. But even though there was a small amount, you continued to go on and test it and see about blood grouping?

A. That's correct. Because right now, as I said, basically it's a new technique and we're testing this routinely in our laboratory, running the p-30 analysis, but in tandem also doing the blood typing just to make sure.

Q. Now, the fact that after the blood typing, you didn't find any blood type in that, what does that indicate? Does that indicate anything to you dispositively?

A. I would say in this case it

indicates there just probably was not enough semen there to find any blood group substances, even if they had been there.

Q. Mr. Heller, in your experience as a criminalist, you've had occasion to do quite a few analyses of rectal swab samples?

A. Yes.

Q. All right. In your experience, have you found the rectal swab to usually have a large amount of semen stain?

A. No, generally not. I would say probably about ten percent of the swabs, rectal swabs that we get in the laboratory, actually we find semen present. And usually it's difficult to find any sperm present on the swabs. It tends to be -- there are a couple of reasons for this.

One, generally the gravity in a victim's underwear will take away a lot of the semen from the rectal area. And a lot of the sperm are destroyed by bacteria. There is a tremendous amount of bacteria present there which destroys sperm.

So you don't usually find it in concentrated stains in rectal swabs.

Q. So, in your experience, it's not unusual to, even though you do run the test and try to find out what the blood groupings are, to come out with something that no blood groupings show as a result of the test?

A. That's correct. But that's not limited to rectal swabs. Many times finding no result for a particular test is not unusual.

We're dealing here, we're not dealing with perfect samples like you

would in a clinical setting. We're dealing with stains off of clothing and/or swabs that are taken in a hospital in an emergency setting.

So getting perfect samples that are ideal for blood typing is still rare. I mean many times you're not going to get enough samples to perform an adequate analysis to get blood group substances.

Q. So the sorts of results that you got on the test involving David Leon's case were not at all unusual in your experience?

A. No.

Q. Doctor, did you perform any other --

A. I'm not a doctor.

Q. I'm sorry. Mr. Heller, did you perform any other laboratory tests in regard to this case?

A. No, I did not. Those are the two tests.

MS. WARD: Thank you.

I have no further questions.

MS. WITTELS: I have some questions.

CROSS-EXAMINATION

BY MS. WITTELS:

Q. Mr. Heller, let me start from the beginning. You said that you're familiar with what's called a sexual assault kit; are you not?

A. That is correct.

Q. Or a rape kit?

A. Yes. These are kits that are left as I take it at all the hospitals in the Tucson area; is that right?

A. Just about all of them.

Q. The point of that is if a victim comes in stating that they've been

a victim for instance of a sexual crime, that the doctors and hospital personnel are there and they've got all the paperwork and they know exactly what evidence or what items they're supposed to take; is that right?

A. That's correct. In fact, we go around in the hospitals and do some instructional work in that area.

Q. And the whole point of that kit is to help the police in gathering up evidence of a crime; is that right?

A. That's correct.

Q. And as I understand it, there are two points of that kit and other similar things. One is to attempt to gather evidence as to whether or not a crime has in fact been committed; for instance, in this case whether or not there was any sexual activity done on David Leon; is that correct?

A. That's correct.

Q. And you would try to show that by trying to figure out whether or not there is any sperm or semen anywhere on David Leon or on his clothes; is that right?

A. Yes.

Q. Then there is a second point of those tests; isn't that right? That second point is to try to exclude or include people who might be guilty of that crime?

A. That's correct.

Q. So in this case the first problem with that test, you were able to test not too long after this incident the rectal swabs from David Leon and discover that there was in fact semen or sperm on the swabs; is that right?

A. That's correct.

Q. Okay. So we know in fact

that some sexual activity occurred; is that right?

A. That's correct.

Q. Now, then the second set of tests you were running was an attempt to determine what the blood typing was; is that right?

A. That's correct.

Q. Let me go over with you briefly what I understand. It's my understanding that there are four types of blood types in the ABH typing system?

A. Well, the ABO system.

Q. Oh, ABO. Okay. One blood type would be type A?

A. That is correct.

Q. One blood type would be type B?

A. Yes.

Q. One is AB?

A. Yes.

Q. And another one is O?

A. That's correct.

Q. Everyone in the world basically is one of those four blood types; is that right?

A. That's right.

Q. You can find out by taking a sample of anyone's blood what blood type they are?

A. That's correct.

Q. Then everyone in the world is also either a secreter or nonsecreter; is that right?

A. That's correct.

Q. And approximately eighty percent of the population is secreters?

A. Yes.

Q. And again as I understand it, a secreter means -- for instance, with me if I were a secreter, even if you didn't take some of my blood, if you took some

of my saliva, if I were a secreter, you could figure out what my blood type was?

A. Yes.

Q I guess one point of blood typing is if someone needs a transfusion, it has to be the right type; is that right?

A. Yes.

Q. As far as criminal laws, the point of the blood typing is to try to narrow down who a possible rapist could be; is that right?

A. I look at it as trying to individualize the stain in order to try to exclude a particular person from being able to commit that crime.

Q. Okay. So it could work two ways. It could exclude someone if they were a totally different blood type or it possibly could not exclude them, meaning it could include them if they were the

right blood type; is that right?

A. That's correct.

Q. So, approximately a year after this incident, you tested the rectal swab in an attempt to determine whether or not you could get a blood typing from it?

A. That's correct.

Q. Okay. And it is my understanding that during this year period, the rectal swab or the sexual assault kit was either refrigerated or frozen?

A. I believe it was refrigerated.

Q. Is that good enough for preserving ABO blood type?

A. Oh, yes, certainly.

Q. Okay. Now, it's my understanding that after doing that test, you could not get a blood type from the rectal swab. Is that right?

A. That's correct.

Q. Okay. And that you chose not to redo that test because you were confident that your result was correct?

A. That is correct.

Q. Okay. Now, it's my understanding that the fact that you could not get a blood type from the rectal swab leads to one of only really two possible conclusions.

One conclusion is that the rapist is a nonsecreter, the rapist or the semen donor as I guess you scientists like to call it is a nonsecreter because this was no blood type. Isn't that one possibility?

A. That's correct.

Q. The second possibility is that you can't really say, you can't say that possibility number one is positive because it could be that there wasn't

enough sperm or enough semen to test; isn't that correct?

A. That's correct.

Q. And you can't really narrow down for us between those two possibilities which it is; is that true?

A. That is right.

Q. You can't tell whether it's that the rapist is a nonsecreter or whether there just wasn't enough of a sample of semen to tell?

A. That's correct.

Q. That's based on the testing you did of the rectal swab?

A. That's correct.

Q. Not too long ago, in fact it would be I guess January 10th or January 17th, sometime in January, 1985, you were then given some clothing from the victim whose name is David Leon?

A. That's correct.

Q. Okay. You ran the same tests and attempted to get a blood type from that?

A. Yes, I did.

Q. And you again found some sperm or some semen; is that right?

A. That's correct.

Q. Indicating to you again that some sexual activity had occurred?

A. That's correct.

Q. Okay. Then you ran the second set of tests and tried to get a blood type; is that correct?

A. That's correct.

Q. And again you found no evidence of blood type whatsoever?

A. That's correct.

Q. Now, the State asked you again whether it were the same two possibilities and I believe you answered yes. Is that right?

But that one was more likely than the other on the clothing?

A. Right, considering the fact that and in addition at this particular time I had run the P-30 analysis.

Q. The P-30 analysis indicated to you that there really wasn't enough of a sample?

A. That's correct.

Q. And thereafter, the testing on the clothing really wasn't that important in this case because, as it turned out, this wasn't enough of a sample?

A. Well, I don't know if it wasn't important, but it turned out there was not enough sample there, that's correct.

Q. Between the two alternatives, with the clothing you think the more likely reason for not finding blood type

is the fact that there wasn't enough of a sample; is that right?

A. That's correct.

Q. Let go back to the rectal swab. You stated that you cannot decide between, you cannot choose among those two alternatives; is that right?

A. That's correct.

Q. But in fact, there are two tests that you could have run to determine whether or not it was alternative two?

Now, alternative one is that they've got the wrong guy, that the rapist is a nonsecreter.

Okay?

And alternative two is that there isn't enough of the sperm or semen sample to tell. Okay?

A. That's correct.

Q. But in fact, there were two

separate tests, one of them is the P-30 test and one of them is the acid phosphatase test, that you could have run on the rectal swabs to determine whether or not there was a sufficient sample of semen to test; isn't that correct?

A. Are you referring to back in November of '83? Or back in November of '84?

Q. Right.

A. At this particular time, those tests weren't in practice in our laboratory.

Q. Okay.

A. But it could have possibly been run.

Q. You have heard of those tests?

A. Yes.

Q. They're not something new. I mean there are laboratories around the country that have been doing the P-30

test and the acid phosphatase test for quite some time; are there?

A. I wouldn't say quite some time. P-30 was discovered in 1977. We're talking about seven years. It's relatively new.

Q. But there have been labs that have been running the P-30 test for the past seven years; is that right.

A. Well, I wouldn't say that for the past seven years. Because anything that's first discovered is not immediately placed into operation so to speak.

Q. How about the past five years?

A I would say probably around five years.

Q. How about the second test I mentioned, the acid phosphatase test?

A. Acid phosphatase, I guess to explain to the jury, is another

constituent of semen. There are ways of quantitating the amount of acid phosphatase, therefore giving you an indication of how much semen is present.

That has kind of been diminished in its use the last couple of years because the appearance of acid phosphatase in a woman is, it's very hard to differentiate the amount of acid phosphatase that was present normally and that in semen.

Q. If I were to tell you that the victim in this case is approximately a ten-year-old boy, there wouldn't be that problem with the acid phosphatase?

A. That's right.

Q. Confusing something with vaginal fluid?

A. That's correct.

Q. In fact, those two tests were in existence, although perhaps not at the

Tucson Police Department; is that correct?

A. That's correct.

Q. Either of those two tests could have given us an answer as to whether or not there was a sufficient sample of semen where we should have gotten a blood typing from the rectal swab; isn't that true?

A. It's possible.

Q. You didn't do either of those tests; did you?

A. No.

Q. Now, you're telling us that you are doing the P-30 test at the Tucson Police Department?

A. Yes.

Q. In fact, you did a P-30 test on David Leon's clothing?

A. Yes.

Q. Now, you are at the state of the art situation where you are doing

P-30 tests; is that right?

A. Yes, it is.

Q. To this date you still have not tested the rectal sample to see if there is a sufficient sample?

A. I'm not sure how much of the rectal swab that is left to do testing. You're dealing with a swab that's into the size of a Q-Tip. I would have to go back and determine if there is any material to be tested.

I suppose I could go back and do a P-30 test.

Q. But you haven't done that test?

A. No, I haven't.

Q. Therefore, there is no way that you can tell this jury whether it's alternative number one, which is that the rapist is a nonsecreter, or alternative number two that wasn't a sufficient

amount of sperm or semen to test for blood type?

A. That's correct.

MS. WITTELS: Thank you.

I have no further questions.

REDIRECT EXAMINATION

BY MS. WARD:

Q. Mr. Heller, Counsel's asked you in great detail about the possibilities of different things. Now, in your experience and with your education and your training, you've answered that it's possible, it's possible that there could be two interpretations of the fact that the swab, the rectal swab semen stain came out not showing any blood groups.

A. That's correct.

Q. All right. And one of those possibilities is that the sperm donor was

a nonsecreter?

A. Yes.

Q. Nonsecreters are about twenty percent of the population?

A. That's correct.

Q. All right. But in fact, the other possibility is that you just didn't have enough of a sample; is that right?

A. That's correct.

Q. Okay. It's possible that it's the first one. But is it much more probable, given your own experience and your training and everything you know about how these samples are taken and how they're tested, is it more probable that in fact the size of that sample was so small that you were unable to --

A. I really can't say that it's more probable that either likelihood exists, because I don't know the probability. That would be saying that I

knew that the individual was a nonsecreter or nonsecreter to start with.

I don't know what the semen donor was. I can't say that either one is more probable.

The only one that I can say is that in my working with sexual assault kits and rectal swabs and smears, I can just say that there usually is not very much semen to work with. That's just my own experience. Whether or not that applies to this particular case, I really can't say. I'm just saying as my experience, that's the way it normally exists.

Q. All right. I think that's what I'm getting at. Just in your own experience, when you've worked with these sexual assault kits and taken the swab, rectal swab and examined it, just in your own experience, you have not been able to

get enough of a sample to be able to see whether or not there are blood types?

A. Usually most of the samples, swabs don't even contain semen, even though there was apparently some sort of a sexual contact.

This is because, again going back to the nature of the assault, there is a wiping on clothing and there is also a great deal of bacteria present and it destroys the sample.

So the likelihood of finding a really good concentrated semen stain is unusual.

MS. WARD: Thank you.

I have no further questions.

MS. WITTELS: Just a couple of questions.

RECROSS-EXAMINATION

BY MS. WITTELS:

Q. Mr. Heller, how many sexual assault kits have you looked at?

A. Oh, I would say probably somewhere between seven and eight hundred.

Q. Okay. And approximately how many times have you found blood typing?

A. Oh, see, that's not done on every case.

It would be about a hundred cases.

Q. Okay. You mean you're not asked to look for blood type on all of them?

A. Well, sometimes it's not the question. The legal question is not -- I'm asked to do what I'm -- I mean I do what I'm asked to do.

Q. Okay.

A. Some instances the presence or absence of semen is sufficient for that particular case. There is not a

question of blood grouping or individualizing the stain.

Q. It's a question of whether or not there was any sexual activity?

A. That's correct.

Q. Let me narrow you down. Out of the seven or eight hundred sexual assault kits that you looked at, in how many were you asked to try to get a blood type?

A. Oh, I will say probably in the last three hundred, three hundred fifty. That's an estimate.

Q. So in approximately half or a little less than half of the sexual assault kits, you've been asked to look at, and approximately half of the seven hundred to eight hundred ones, which would be about three hundred to three hundred fifty, you've been asked to get a blood type; is that right?

A. That's correct.

Q. So approximately one out of three times, you were able, there was enough semen on the swab to get a blood type?

A. That's probably about right, about thirty. I would say about thirty-three, thirty percent of the time we get a sample.

Q. In fact, it's probably even a higher percentage than that, because although you said a hundred, approximately a hundred times, you got a blood type from the sample, that there were others that you tested that ended up with no blood type which may merely show that the rapist or the semen donor was a nonsecreter; isn't that right?

A. That is correct.

Q. So, in fact, in more than a third, maybe somewhere between a third

and a half of the tests that you were asked to run by the prosecution to get a blood type, you do get a blood type?

A. Yes. I will say that there are times when the defense asks to run those tests, too.

Q. Okay.

MS. WITTELS: No further questions.

FURTHER REDIRECT EXAMINATION

BY MS. WARD:

Q. Mr. Heller, just to clarify some of the statistics here, I think counsel asked you how many rape kits you had looked at and your reply was seven hundred to eight hundred?

A. Something around that area.

Q. Did that include both vaginal and rectal?

A. Certainly. Most of the rapes

are of vaginal smears and vaginal swabs.

Q. In the rectal swab, is it your experience that there will often be less of an opportunity to gather up a sample from a rectal swab than there is in the vaginal area?

A. I think if the sample is there and the person collecting the evidence is competent in collecting it, it should be collected.

I would just say from my own experience that rectal smears and rectal swabs, I don't seem to find semen present or small amounts of it.

MS. WARD: Thank you.

I have no further question.

MS. WITTELS: No further questions.

THE COURT: All right.

Thank you, Mr. Heller.

THE WITNESS: May I be

excused?

THE COURT: Yes.

(Witness excused.)

THE COURT: Ladies and gentlemen, we'll take the afternoon recess now.

Please follow your previous admonitions.

THE BAILIFF: Court's in recess.

(Trial proceedings recessed 3:40 p.m. and reconvened 4:05 p.m.)

APPENDIX D

FROM THE DECEMBER 19, 1984 VOLUME

KEITH PETERSEN INMAN

being duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. WITTELS:

Q. Keith, could you please state your full name for the jury?

A. Yes. Keith Peterson Inman,

Q. Are you presently employed?

A. Yes. I have my own consulting criminalistics laboratory in Los Angeles, California.

Q. Could you tell us a little bit about your qualifications, education and experience?

A. Yes. I have a bachelor of Science degree in criminalistics from the University of California at Berkeley. I also have a masters degree in

criminalistics from California, Berkeley.

I served two student internships: One at the Contra Costa County Sheriff's Crime Lab, one at the Orange County Sheriff's Crime Lab.

Subsequent to that, I was hired by the Orange County Sheriff's Crime Lab where I worked as a criminalist for one year.

After that I moved to the Los Angeles County Sheriff's Department where I worked for five years. After that I moved to the Chief Medical Examiner/Coroner's Office in Los Angeles, California where I worked as a criminalist for one year.

Then I've had my own laboratory for one year since that time.

Q. Are you a member of any professional associations?

A. Yes. I am a member of the

American Academy of Forensic Sciences and the California Association of Criminalists.

I am also an advisory board member of the Los Angeles Commission on Assaults Against Women and serve on the Los Angeles County Bar Association Sexual Assault Legislative Subcommittee.

Q. Have you given lectures for prosecuting agencies?

A. Yes. I have delivered lectures to the California District Attorney's Association and recently for the National College of District Attorneys.

Q. The work that you presently do, you're with a private place?

A. Yes.

Q. And do you do work for just defense attorneys or for prosecutors? What kind of work do you do?

A. Actually, my practice is quite

varied. I do both civil and criminal and work cases both for the prosecution and the defense or the plaintiff and the defendants.

Q. Have you previously been qualified as an expert?

A. Yes.

Q. And approximately how many times?

A. I usually approximate that at seventy-five to a hundred and twenty-five.

Q. Now, your laboratory is called a forensic science laboratory; is that correct?

A. Yes.

Q. To your knowledge, are there any forensic science laboratories in the State of Arizona other than those connected with law enforcement?

A. There is one private laboratory of which I am aware and that is a place called the same thing, Forensic Science

Services in Phoenix run by Luke Haque.

He is an expert in firearms and trace evidence analysis.

Q. Could you tell us generally what you look for in analyzing semen?

A. Generally, when one attempts an analysis of a semen sample, there are two questions that physical evidence may help answer. The first question is is semen present? The second question is whose semen is it, if semen is present?

With regard to the first question, there are three criterion by which we may determine if semen is present. One is the finding of spermatazoa. Another if spermatazoa were not detected would be the finding of a molecule that's called P-30.

It's found to be a semen specific protein. That is, it's found only in semen. And therefore, if you detect it,

you are certain that semen is present.

And the third is detecting an enzyme in semen that is called acid phosphatase. It is present generally in very high concentrations in semen. And throughout its history, some people have felt that that would be a good indication that semen is present.

There are other ways of looking at acid phosphatase that would confirm the presence of semen in the absence of spermatazoa and even P-30.

While those three are used to detect semen, they can also be used for another purpose. That is estimating the amount of semen that may be present. That is, trying to determine at what level semen is present in your particular stain.

And I would emphasize that this is an estimate. It cannot be done with any great precision due to the fact that

these three things are all found varying concentrations in the semen of different individuals.

With regard to the second question, whose semen is it, there are generally considered to be two what we call genetic markers that we can use to try to narrow down who the semen donor might be. That is the ABO system or what you would normally consider to be your blood type and a system that we abbreviate with the initials PGM.

The value of these tests I might explain in the following way and I will use ABO to illustrate the value since most people are familiar with that. Virtually everybody knows that there are four common ABO types: Type A, type B, type AB and type O.

Those types occur with different frequencies within the population. That

is, about half the population would be type O, only about five percent would be type AB.

If we were to type everyone in the courtroom, we would be able to put people in various corners according to their ABO type. If we had the As in one corner and the Bs in another and the ABs in another and the Os in another, we've divided the population then within this courtroom into smaller subpopulations.

If we then had a blood stain or a semen stain that we determined to be type O, then anyone in the corner with type O blood could be the donor of that sample.

And I guess we better use blood to include all the women, since obviously the female would not be a donor of a semen sample.

But more importantly, the A, B and AB individuals would be excluded as being

the donor of that sample.

The value of that test is that it may include or exclude someone as being the donor of that sample.

If, for example, taking our illustration one step further, it were type O blood, we would be able to say that approximately fifty percent of the population could have donated that particular stain.

The PGM systems works in the same way. There are ten types rather than four as in the ABO system. And again, they occur with different frequencies within the population.

So, if we had a blood stain and found it to be a two plus one plus which is the way we designate PGM types, then we would exclude all other nine types as being the donor of that sample and could exclude X number of people on a

percentage basis as being the donor of that.

When both of these tests are done together, for example, in a semen analysis, then what we are able to say is that putting the ABO and the PGM together along with another trait called secreter status, we would be able to say that X percentage of the population possesses these types that we've detected, type O and PGM type two plus one plus in our example, and if then we had someone to whom to compare the sample, we could say whether that individual is either included or excluded as the semen donor.

We can use the quantitative estimate that we had done previously on the sample to make some kind of prediction as to whether we would expect to find either the ABO or the PGM in our semen sample.

For example, it's known that there

is only a certain quantity within some range value of PGM in semen. And the same with ABO. If your semen sample is diluted too much, then you may not in fact be able to pick up that activity.

So when a full analysis has been done, you have detected semen, you've made some estimate as to how much semen is present and you have typed the sample and made some kind of statement as to the significance of your findings, both in terms of whether or not you have found something and what the significance of not finding something may be.

And one other thing to throw in there, and it is on the point of the possibility of detecting any of these markers and it has to do with secreter status. Secreter status is tied in only with ABO. That is, we speak of secreter status as the inherited ability for an

individual to place their ABO blood group substances into what I call body fluids such as saliva, semen, vaginal fluid, things of that sort.

Not everyone will in fact place their ABO substances into those fluids. Only about seventy-five to eight percent of the population would be able to do that. Those individuals are called secreters.

Again, remember that it only relates to ABO and not PGM.

The other twenty to twenty-five percent of the population are called nonsecreters.

And putting it all together then, the value of doing the extimation of the quantity of semen in a sample is to try to determine if in fact you may have a nonsecreter semen donor and therefore do not detect any antigens, or if in fact

the semen level is too low, to detect those antigens.

Q. Now, as I understand it, two of the tests you spoke of, the P-30 test and the acid phosphatase test, are tests to determine whether you have a sufficient quantity of semen.

Is that correct?

A. Actually, you can use all three; that is, spermatazoa, P-30 and acid phosphatase. All of them have some limitations and they tend to be different.

So one likes to have all three if possible. But certainly as many of those tests as one can do in order to make a proper estimation.

I would say of the three, in my own experience, the least reliable would be the number of spermatazoa, just because there are so many possibilities for not detecting spermatazoa.

Nonetheless, at times, it can be useful.

Q. Now, the P-30 test that you spoke of, when was that test first created or discovered or whatever?

A. Well, the molecule itself has been discovered, lost and rediscovered several times in clinical and forensic science history. I think it emerged solidly in the forensic science area in 1978.

Q. How about the acid phosphatase test?

A. Acid phosphatase has been done in forensic laboratories since the late 1940s. It was suggested as a test in 1946 by several workers.

Q. Now, in your experience and education in this field, are these tests, the P-30 test and the acid phosphatase

test, routinely done or very rarely done?

A. It depends upon the laboratory. If a laboratory does P30, it does it routinely.

My estimate now in talking with colleagues and my familiarity with laboratories around the country would indicate that probably more than half of the laboratories in the county use P-30.

Q. How about the acid phosphatase test?

A. I think virtually everyone uses the acid phosphatase test to some extent or another. There are different ways to do it.

Q. Now, is there a need to preserve the semen in a particular way in order to do the tests that you spoke of?

A. Yes. Biological material deteriorates. If you've every had meat go bad or cheese go bad in the

refrigerator, you'll know that that is true.

There are generally five things that would contribute to the deterioration of biological material. They are time, temperature, humidity, that is the moisture content of the sample, light and contamination such as microorganisms.

There are different results on the various seminal constituents from deterioration.

P-30, for example, seems to deteriorate fairly straightforward, in a fairly straightforward manner with time, temperature and humidity.

Acid phosphatase on the other hand seems to be fairly stable in the dried state. It loses some activity upon drying, but it can be stable for years once it is dried.

The change with regard to the ABO

and the PGM is very difficult.

For example, if deterioration has taken place in a way that has allowed for contamination, that is, the presence of microorganisms, you may either get destruction of ABO activity that was originally present and/or the creation of false ABO activity by the microorganisms themselves. So that one can get either a false negative or a false positive with the ABO if deterioration by contamination takes place.

PGM on the other hand seems to be most affected by time, temperature and humidity. The longera sample is in existance without, for example, freezing procedures being done, the quicker the PGM will deteriorate.

Temperature is also a factor. As temperature is elevated, for example, to body temperature, deterioration takes

place more rapidly than at room temperature.

Moisture seems to be a very dire enemey of PGM. PGM seems to die within twelve to twenty-four hours if kept moist for that period of time.

The best way to preserve biological evidence to minimize these effects is to freeze it. That lowers the temperature. It doesn't exactly freeze the sample in time and, pardon the expression, but it severely curtails the effect that time has on the sample.

Humidity or that is moisture content is less of a factor because the molecules being frozen is a matrix did not interact to denature. Generally, if something is frozen, it's out of the light and contamination, that is the proliferation of microorganisms takes place at either no or at a significantly reduced level

frozen.

Q. Now, have you read any lab reports or notes in regard to the case of Larry Youngblood and David Leon.

A. Yes, I have. I have laboratory reports and notes from a criminalist by the name of Ed Heller and I also have a laboratory report without notes from a criminalist by the name of Deborah Friedman.

Q. Have you in fact in addition also spoken with Ed Heller over the phone?

A. Yes, I have.

Q. To discuss this case?

A. Yes.

Q. Okay. Could you tell us, could you summarize for us, please the results from these items or from these lab reports?

A. Well, particularly with regard to the rectal sample, which is an

examination that it appears Ed Heller performed exclusively, he examined the rectal sample for spermatazoa and he found according to his notes several sperm heads, that is, heads that are detached from the tails.

And that was over the entire preparation. That is, on the entire slide, he found just a few spermatazoa heads.

He then examined that sample for ABO blood group substances and found none.

He also examined a blood sample and a saliva sample from an individual identified as David Leon and found that Mr. Leon is a ABO type O secreter.

Q. Okay. That I think summarizes his results.

Now, in addition to that, did you also do any testing of a saliva sample from Larry Youngblood?

A. Actually, I examined both blood and saliva from Mr. Youngblood.

Q. What was the results of your findings?

A. I was able to determine that Mr. Youngblood is an ABO type A secreter.

Q. And to take that one step further, would that mean that were sufficient sperm, were Larry the semen donor, we would expect to find ABO type A in the sperm?

A. Phrasing that another way, if there were a sufficient quantity of semen as opposed to spermatazoa, which is just one constituent, if there were a sufficient quantity and a properly preserved sample, one would in fact expect to find A activity and H.

Q. Now, do you have an opinion as to what the significance is of the findings from Ed Heller regarding not

finding any ABO activity on the rectal swab?

A. Yes.

Q. What is your opinion?

A. From the testing that was done, it seems like there are two alternatives and three that, one of which I think we can discard and I will talk about that. The first possibility is that the semen donor is a nonseceter of any type.

The second alternative is that the semen sample was too dilute and that it was, there was too little semen and therefore one would not expect to find ABO from anyone, either a secreter or a nonsecreter.

The third alternative is that any ABO antigens that had originally been present were destroyed by microorganism or biological activity.

In talking with Mr. Heller and in

going over his laboratory notes, it's clear that the sample has been frozen since very shortly after it had been obtained.

Therefore, I would be included to rule out the third alternative. Bacterial contamination generally does not occur so quickly that it would destroy the antigens in that short period of time, between the time it was taken and the time it was frozen.

So that basically gets us down to the two alternatives: Either it is from a nonsecreter semen donor or the semen is too dilute.

And we have no information regarding the semen donor on this second alternative.

Q. Based on the tests that have been done in this case, can we choose or can you choose between those two

alternatives, that being the semen donor is a nonsecreter or the semen was too diluted?

A. I think scientifically we are not able to distinguish between those two choices. Given what I indicated earlier that spermatazoa seemed to be the least reliable factor in estimating the quantity of semen, given what we do not have any information from a P-30 or an acid phosphatase test, we really lack information that would allow us to make a choice between those two alternatives.

So that scientifically, I think we would have to say that they are equally likely.

Q. Now, are there any other tests or analyses that could have been done to help you determine or choose between the two alternatives that you've given us?

A. Well, again, if we had

information from an examination for P-30 and/or acid phosphatase, we might be in a better position to lean towards one of those two alternatives.

Q. Now, as you I guess are aware through me, the victim in this case was taken to a hospital shortly after this incident and the police took into evidence his underwear and his clothing.

Could you give us your opinion of how helpful that evidence may have been?

A. I guess the question is, is it important to save and preserve underwear evidence?

And the answer to that is generally in any sexual assault, whether it be on a female or a male, vaginal or rectal, there is a natural drainage and leakage of semen out of the rectum or the vagina and it is going to be deposited on whatever is underneath, whatever is

underneath.

That's generally a pair of underwear. Sometimes it's a pair of jeans or a skirt or something of that sort. But anything that's underneath is going to catch that semen sample.

Q. Okay. Could you tell us why -- well, would the sample -- would a sample taken from the boy's underwear be better than a rectal swab?

A. My experience tells me and has shown me that frequently a pair of underwear will be a very good sample for looking for traces of semen. And there are three reasons for that.

The first is that in many cases you will have more semen on the underwear than you will have in the cavity, either the rectum or the vagina, just because of that natural drainage and leakage. And the more time that there is between the

assault and the collection, the more that is going to be true.

The second reason that it tends to be a better sample is that it dries more quickly. That is, it's going to be dried quicker than a sample, for example, a swab sample because it is going to be deposited earlier and therefore, it's going to dry quicker.

And if you recall, I mentioned that moisture is an enemy of biological materials. Therefore, if it dries quicker, you're going to have a better preserved sample, that is, less chance for deterioration.

The third reason is that there tends to be less contamination in that sample. I'm talking about contamination with either vaginal fluid or material from the rectum. A vaginal sample is obviously not critical in this case. But it's

going to be less contaminated with material from the victim himself.

For those reasons, that there is generally more semen, that it is better preserved and that there is less contamination, that makes it a better sample for examination.

Q. And in fact, in your experience working with law enforcement agencies in the state of California, is is true that frequently the underwear from the victim is examined?

A. It actually depends on the circumstances.

If the sample in question, the swab sample, appears to have a low semen content or if it's negative, then many agencies, many criminalists would in fact examine the underwear or clothing or anything else that might be available for traces of semen.

Q. Okay. Now, if the sample on the boy's underwear were a better sample, what could we get from it?

A. One would increase the probability of obtaining useable results; that is, ABO that's unequivocal, PGM that gives you clear results.

And because there is the possibility of it being less contaminated, it would tend to be more significant and give you more clearcut results in terms of who the semen donor might be.

And ultimately what that means is that there is a greater change of excluding someone falsely accused of being the semen donor or defining a very small population of who the semen donor might be.

Q. And in this case to test the underwear for PGM, the underwear or that portion of it that may have had semen on

it should have been frozen; is that right?

A. Yes.

My understanding is this case occurred probably over a year ago.

Q. Yeah. On October 29th, 1983.

A. Yes. In that time frame, freezing most definitely would be a must for that sample.

Q. Thank you.

MS. WITTELS: I have no further questions.

THE COURT: Ms. Ward.

MS. WARD: Thank you, Judge.

CROSS-EXAMINATION

BY MS. WARD:

Q. Mr. Inman, you have been educating us a great deal as to different methods and ways that as a criminalist you proceed to define and break down fluid samples for blood type groupings, and so forth.

And it is basically a process of elimination; is that right? When you get an answer, you know, then you can say, all right, if I have an A type secreter, then you eliminate an AB, O.

It breaks it down; it doesn't tell you dispositively who the donor is?

A. Correct. It's generally a process of elimination. And the other way we have of looking at it is that one can never say with certainty that it is one individual to the exclusion of all others.

What you do, you simply define a smaller and smaller population. It may be fifty percent, it may be ten percent, it may one-tenth of a percent. But that's still generally more than one person, unless you have a closed population.

Q. You also testified that

different laboratories may have different procedures and different methods.

I believe the defense counsel asked you a question about a P-30 and acid phosphatase and if it was done, you know, across the board by everyone. Your answer was, well, it depends on the laboratory?

A. Right. The first part of your question isn't exactly the same as your second.

Most people if they do P-30, for example, will do it by one method. The question isn't whether they do or whether they don't do acid phosphatase. I think I indicated there may be several methods. So distinguishing between that.

Generally though, I think the answer to your question is yes, some people do this, some people do that.

Q. You spoke with Ed Heller in this

case?

A. Yes, I did.

Q. You're aware in his criminal laboratory, they did not use this particular method until very, very recently.

A. I think what he indicated is that they did not do it at the time and they are just now attempting to put it into routine operation in their laboratory.

Q. So back in October of 1982 and November of 1984 when the tests were performed on this sample, they weren't doing it?

A. That's my understanding, yes.

Q. And you had a chance to look at his lab report and to see what it indicated?

A. Yes.

Q. And when you started talking to

us, you indicated there are really sort of threshold questions or two of them. One, is there any evidence of sperm?

A. Semen.

Q. Semen?

A. Yes.

Q. Thank you.

And then once you can decide that, then you go on the next question of possibly trying to eliminate groups from it, trying to break it up even further, and so forth, for identification purposes?

A. That's correct.

Q. Okay. In this case, Ed Heller properly reached that first question first and in his tests he did find from the rectal smear the presence of spermatazoa?

A. That's correct.

Q. And he indicated it was being, I believe you said just a couple of --

Q. His indication in his notes is several sperms heads seen. When I spoke with him, I asked him do you mean per field?

That is, when you look at one field on a microscope slide, is it several or was it several on the entire miscroscope slide?

His answer was several on the entire miscrocope slide?

Q. But he conclusively, you know, he can state with certainty that there was in fact semen in the boy's rectum? All right?

A. On the rectal swab. But not to split hairs, yes, that's correct.

Q. The second level of testing was done on the same sample, that small sample, from the swab. And in the report, he indicates that he was unable to find any blood group types in that

sample?

A. Any ABO antigens, that's correct.

Q. And your testimony is the fact that he wasn't able to find any blood grouping does not positively mean that there wasn't any blood grouping from the donor; it could mean, it could mean that, but it could equally mean that he just didn't have a big enough sample to find out whether or not there was a blood grouping in that sample?

A. And I think that probably defines the two alternatives that I listed, yes.

Q. Based on his tests, there are really no males that have sperm that could be excluded from the donor, you know, the possible donor class?

A. That's right.

MS. WARD: I don't have anything else.

THE COURT: Miss Wittels.

MS. WITTELS: I have a couple of more questions.

REDIRECT EXAMINATION

BY MS. WITTELS:

Q. Keith, but between the two alternatives, I believe you stated that you can't tell us scientifically which is more likely; is that correct?

A. That's correct.

Q. But had the P-30 test or the acid phosphatase test been done and had the results shown you say that there was a sufficient quantity of semen, then we could narrow it down to alternative one; is that right.

A. That is a possibility, yes.

Q. And that alternative one is that the semen donor was a nonsecreter?

A. Right, which would eliminate Mr. Youngblood as the semen donor, since he

percentage of cases, and don't ask me what percentage, the test will be equivocal. That is, it will fall in a range where we can't be entirely certain that we would expect to find ABO antigens.

So it's what we technically call a wash. That is, we're not exactly certain.

So if you did the test, you would have three possibilities. You would be able to say that there is an insufficient quantity. You're still not sure, which is where we are now and that's all the possibilities. Or you can say for certain that in fact there is enough and we would expect to find ABO antigens.

So that's adding another way of complexity to what we've already done.

Q. That gets a little bit further to being able to say or establish whether or not this person is a secreter, if you find that the blood --

But there are a lot of uncertainties in this whole area of testing; would you agree with that?

A. I hate words like there's a lot of.

Q. A great deal?

A. There's a lot of complexity. And I think I feel better stating it that way. We know that there are a wide range of P-30 levels. There are a wide ranges of acid phosphatase levels.

What that does is it says that there will be some cases where, based on those tests, still we are not able to make up our minds and would still be left with we don't know and therefore no male with spermatazoa would be eliminated as the semen donor.

Q. That's just where we are today, no male with sperm can be eliminated from the semen donor, that is, the man that

raped --

A. As being the semen donor.

Q. -- as being the man that raped David Leon.

MS. WARD: I have no further questions.

MS. WITTELS: Just one more question.

REDIRECT EXAMINATION

BY MS. WITTELS:

Q. But had these further tests been done, with the combination of PGM, ABO typing and secreter or nonsecreter status, it's possible that we could have excluded Larry Youngblood and/or diminished considerably the population of people who might be the semen donor?

A. Yes, that's precisely the object of doing all these tests is to try to get the population below where it is now which is virtually a hundred percent, excluding those people who do not have

spermatazoa.

MS: WITTELS: Thank you.

No further questions.

THE COURT: Ms. Ward?

MS. WARD: No, sir.

THE COURT: Thank you.

(Witness excused).

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
JUN 25 1987
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No. 86-1904

In The
Supreme Court of the United States
October Term, 1986

STATE OF ARIZONA,

Petitioner,

v.

LARRY YOUNGBLOOD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Where strong evidence of misidentification is apparent at the time of an arrest for rape, does the government deny the accused citizen of Due Process under the Fourteenth Amendment to the United States Constitution when it monopolizes control of the attacker's semen samples and allows them to deteriorate beyond forensic usefulness by failing to simply refrigerate those samples?

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STATEMENT

The victim, a ten year old white boy, was abducted and raped by a middle-aged black man by the name of Carl or Damian. The observant youngster identified his assailant as having greasy grey hair, facial hair, no facial scars and a bad right eye. He wore brown leather or

plastic loafers. His car was a white medium-sized, two-door sedan with a noisy muffler and a passenger door that did not work. The radio in the car was tuned to a country music station. The boy was repeatedly forced to the floorboard by his hair. During the hour and a half ordeal, the boy was raped four times. Pet. App. at A2-A6.

Larry Youngblood is a thirty year old black man with dry black hair, a facial scar and a bad left eye. He wears only cloth shoes and walks with a noticeable limp due to a childhood injury. He always wears dark glasses in public. Pet. App. at A3-A4. His car was a 1964 white, four-door Chrysler Imperial. The car ran quietly, but was not working on the night in question. The radio never worked. The car was seized and examined. The only fingerprints found were those of Mr. Youngblood. No hair or clothing fibers from the victim were in the car. Pet. App. at A7-A8.

Nine days later, a detective told the victim that they had arrested his assailant and asked the boy to pick him out of a photographic line-up. The victim identified two of the men in the line-up as possible attackers. One was Mr. Youngblood. Pet. App. at A9-A10.

Shortly after the assault, the boy was taken to a hospital, where a rape kit was prepared. A rectal swab containing semen was refrigerated. Due to natural drainage, the larger and better semen sample would be found in the boy's clothing. Pet. App. at A20-A21. The clothing was seized and semen found on it. Pet. App. at C15. That sample was not refrigerated. Testing was neglected until those samples deteriorated beyond testing. Pet. App. at D38-D39. What testing was done suggested that the attacker was a non-secretor—that minority of

people whose blood components cannot be typed through semen or saliva samples. Pet. App. at D11-D12. Mr. Youngblood is a secretor. Pet. App. at A19.

REASONS FOR DENYING THE WRIT

The Arizona Court of Appeals found, as a matter of fact, that the State had monopolized access to the untested semen samples and allowed them to deteriorate until their forensic value was gone. Pet. App at A-22-A23. *California v. Trombetta*, 467 U.S. 479 (1984) has no application to these facts.

California v. Trombetta, 467 U.S. 479 (1984) dealt with a situation where evidence had been seized and lost, but analyzed in such a way that ". . . a dispassionate review . . . (of the evidence) . . . can only lead one to conclude that the chances are extremely low that preserved samples would have been exculpatory." 467 U.S. at 489. Here, the Court of Appeals found that: "'tests were not made which could have been made and . . . it cannot now be determined whether exculpatory evidence would have been developed.' *See, State v. Hannah*, 120 Ariz. 1, 2, 583 P.2d 888, 889 (1978)." Pet. App. at A23. Having ensured that Youngblood cannot prove the exculpatory content of that evidence, Petitioner claims that he must do the impossible in order to obtain relief.

Underlying this reasoning is the assumption that, absent testing, the materiality of a semen sample in a rape case cannot be known. Semen samples generally serve only two forensic purposes: To corroborate the fact of

intercourse and to narrow the population of semen donors and thereby exclude the innocent. Pet. App. at D9.

Addressing the materiality of this evidence, the court held in *Hilliard v. Spalding*, 719 F.2d 1443 (9th Cir. 1983):

> The materiality of a sperm sample in a rape case thus goes well beyond the *Agurs* 'reasonable doubt' requirement because it can be used to prove the defendant's innocence to a certainty.
>
> Of course, the utility of a sperm sample to the defense necessarily depends on whether or not the blood types match. Thus, if the sperm sample were still available for testing, it would be reasonable to require the defendant to make some showing that the evidence would indeed have been exculpatory. If the sample had come into government hands prior to trial and subsequently been destroyed, however, the government may not interfere with accused's ability to present a defense by imposing on him a requirement which the government's own actions have rendered impossible to fulfill. 719 F.2d at 1445-1446.

That position is consistent with this Court's mandate that "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt." *United States v. Agurs*, 427 U.S. 97, 112 (1976). Petitioner would have us assume that, if it had done its job properly, a dispassionate review of the evidence would have very little chance of being exculpatory. Given the strong evidence of misidentification, as noted by the Court of Appeals, there is no good reason to adopt such an assumption.

Petitioner offers no explanation for the loss of the semen samples. The Court of Appeals found that "The deterioration of the semen sample was caused by the

state's inaction in two areas: 1) the inability to quantitavely test the rectal swab and 2) the failure to properly preserve the 'better sample', the stains taken from the victim's clothing." Pet. App. at A20. Preservation required only use of an available refrigerator. Pet. App. at D18. Notwithstanding Petitioner's laments, that sort of technology has not been 'state of the art' for decades.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted this 25th day of June, 1987.

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PETITIONER'S

BRIEF

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QUESTION PRESENTED

DOES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRE DISMISSAL OF A CONVICTION FOR THE FAILURE OF THE STATE TO EMPLOY STATE-OF-THE-ART TECHNOLOGY TO PRESERVE AND TO TEST BODILY FLUID SAMPLES OF A SEXUAL ASSAILANT WITHOUT A SHOWING THAT THE SAMPLES MEET THE MATERIALITY STANDARD OF *CALIFORNIA V. TROMBETTA*, 467 U.S. 479 (1984)?

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OPINION BELOW

The opinion of the Arizona Court of Appeals, Division Two, (Pet. App. A), is reported at 153 Ariz. 50, 734 P.2d 592, (Ariz. App. 1987). The order of the Arizona Supreme Court, (Pet. App. B) denying review is unreported.

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STATEMENT OF JURISDICTION

The opinion of the Arizona Court of Appeals which the State asked this court to review was entered on October 2, 1986. The Arizona Supreme Court denied the State's petition for review on March 27, 1987. A petition for certiorari was filed within 60 days from that denial, on or before May 26, 1987. On February 29, 1987, this Court granted certiorari. The jurisdiction of this court rests upon 28 U.S.C. § 1257(3).

—o—

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

—o—

STATEMENT OF THE CASE

On October 29, 1983, a ten year old boy was abducted by the Respondent, Larry Youngblood. The boy was forced into a car and told to get down on the floor. On two subsequent occasions the boy tried to get up to see where they were driving, and Youngblood grabbed his hair and pushed him down to the floor.

Youngblood took the boy to a secluded area and fondled him. Then he drove him to a house. Inside the house, the boy was told to get on the bed and take off his clothes. Youngblood sodomized the boy four times. After the sex act, Youngblood tied him up with a towel and went outside to get a jump for his car which would not start. After the car was started, Youngblood came back into the bedroom and sodomized the boy again. Then he sent the boy to the bathroom to wash up. After the boy cleaned up, Youngblood took him to the car and drove him back to where he had abducted him. Youngblood threatened to kill the boy if he told anyone about the assault. The boy was released. The boy was with the Respondent for an hour to an hour and a half.

When the boy returned, the boy's mother took him to a hospital where they met a police officer. The mother related what had happened. The officer directed the boy to get medical attention. The officer summoned additional officers who began the investigation.[1]

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[1]Four people interviewed the boy shortly after the assault: his mother, Officer Cady, Officer Levitt and Sergeant Muehle. Detective Lingel spoke to the boy several weeks later. In addi-

(Continued on following page)

At the hospital the boy was treated by a physician for rectal injuries. The treating physician also used a "sexual assault kit", a kit employed to collect seminal fluid deposited by sexual assailants. The physician used a Q-tip like swab and swabbed the boy's rectum. The sexual assault kit, with the rectal swab, was given to police. The police placed it in a refrigerator at the police station. (Pet. App. C27, D23). Police also obtained the boy's underwear and shirt. The clothes were not refrigerated.

There were five different methods of semen testing which were discussed at the trial. Two of the tests, the ABO blood group test and the PGM enzyme test, are identification tests which aid in narrowing down the field of possible semen donors. The ABO test allows a person's blood type to be determined from other bodily fluids, such as semen. This technique is only successful on 80% of the population that secrete their blood types into their other bodily fluids. The ABO test is not successful on the remaining 20% of the population that are non-secretors, persons whose blood type are not secreted into other bodily fluids.

The other identification test is the PGM enzyme test. The PGM test identifies a genetic marker, other than blood type. (Pet. App. D7, D9). The secretor, nonsecretor status has nothing to do with the PGM test results. (Pet.

(Continued from previous page)

tion, a defense attorney named Steve Sherrick took a tape recorded interview with the boy. At trial the defense attempted to use inconsistencies in these witnesses' recollections to impeach the credibility of the boy. Testimony on these and other jury questions are set forth in some of the footnotes that follow.

App. D11-12). Every sample of semen, if the sample is sufficient enough, will have detectable PGM grouping.

The other three tests serve to quantify the semen, not identify a donor. (Pet. App. D13). The first technique is a microscopic examination of the sample. Based upon the number of spermatozoa viewed, an estimate can be made of the amount of semen present. Another quantifying testing is the acid phosphatase test. This test measures the enzyme, acid phosphatase, which is present in semen. Based upon how much of the enzyme is present an estimate can be made of the quantity of semen present. The test has some limited forensic usefulness since vagina fluid also contains this enzyme.

The last quantifying test is the P-30 protein molecule that exists exclusively in semen. (Pet. App. D5). The protein molecule was discovered to exist in 1977 or 1978. (Pet. App. C34, D14). In 1985 only a little over half the crime labs in the country had become capable of performing this test. (Pet. App. D15). Based upon the amount of the P-30 protein present, an estimate can be made of the quantity of semen present in a sample. (Pet. App. D10). The Tucson police began using the new P-30 protein technique in approximately January, 1985. (Pet. App. C15, C16, C33).

On November 8, 1983, Edward Heller, a police criminalist, examined a smear from the rectal swab under a microscope to determine if there was spermatozoa present. (Pet. App. C7, C8, C23). The criminalist found spermatozoa present but only found several spermatozoa on the entire microscope slide. (Pet. App. D20, D35). The criminalist did not attempt to determine the amount of semen on the swab by a P-30 protein quantitative analysis

because this technique was not yet in practice at the lab. (Pet. App. C9, C33, C34). The clothing was not tested at this time.

On December 7, 1983, the police obtained a felony arrest warrant for the Respondent. R9-10. On December 9, 1983, the Respondent was arrested for kidnapping, child molestation and sexual assault. On December 20, 1983, the Respondent's attorney filed a motion claiming that the Respondent's competency to stand trial was in question. R20-21. The trial court ordered mental examinations of the Respondent. R22-24. On April 3, 1984, the Respondent's attorney filed another such motion claiming that the Respondent was a chronic schizophrenic. A trial date was not set pending psychiatric examinations. On August 27, 1984, the trial court found Youngblood competent and set the matter for trial.

On October 12, 1984, the State moved the trial court to order Youngblood to give blood and saliva samples for comparison with the sexual assault kit. The State could not show that it had obtained sufficient samples which could be compared. The motion was denied on October 15, 1981, because no showing could be made that a valid comparison could be made with the sexual assault kit. The Respondent never gave any sample of his blood or saliva to police.

On October 15, 1984, the police criminalist again examined the refrigerated rectal swab sample. This time the criminalist performed an ABO blood group test on the minute sample in an effort to determine the assailant's blood type. (Pet. App. C10-11). The test results indicated that no blood group substances were detectable in

the rectal sample. (Pet. App. C11). The criminalist explained it was unusual to get detectable blood group substance results from rectal swab samples because of the small amount of semen present on the rectal swabs. (Pet. App. C11, C18-19, C41). He testified that only in about 10% of tests on rectal swabs is sperm found to be present. (Pet. App. C18-41).

The case first went to trial December 13, 1984, but resulted in a mistrial. In approximately January, 1985, the police began using the new P-30 protein quantitative analysis technique. (Pet. App. C15, C16, C33). As the new P-30 protein test became available, the criminalist tested the clothing. The P-30 protein test on the clothing showed a very small quantity of semen present on the clothing. (Pet. App. C16-17). The criminalist also tested the clothing, as he had the rectal swab for ABO blood group substances. (Pet. App. C16-17, C30). The criminalist, based upon the P-30 protein test, found that the failure to find blood group substances was due to there being not enough semen present on the clothing. (Pet. App. C17-18, C30-32).

At the trial the police criminalist testified about his examination of the "sex crimes kit" and victim's clothing He admitted that he had not run the P-30 protein analysis on the swab, but offered to go back and do the tests. The defense attorney was not interested in what tests could be done, but in only what tests had not been done.

A. . . . I suppose I could go back and do a P-30 test.

Q. But you haven't done that test?

A. No, I haven't.

Q. Therefore, there is no way that you can tell this jury whether it's alternative number one, which is that the rapist is a nonsecretor, or alternative

number two that wasn't a sufficient amount of sperm or semen to test for blood type?

A. That's correct.

Ms. Wittles (sic): Thank you. I have no further questions.

(Pet. App. C37-38).

During subsequent cross examination the following exchange took place:

Q. So, in fact, in more than a third, maybe somewhere between a third and a half of the tests that you were asked to run by the prosecution to get a blood type, you do get a blood type?

A. Yes. I will say that there are times when the defense asks to run those tests, too.

Q. Okay. No further questions.

(Pet. App. C44-45).

The defense presented the prior trial testimony of another criminalist, Keith Inman, to speculate about the states preservation and testing of the samples in an attempt to inject doubt about the identity of the assailant. This expert did interview the police criminalist. He did not examine the "sex crimes kit" or the victim's clothing. He made no attempt to perform any analysis or examination of either the rectal swab or the clothing. The defense criminalist testified, as had the police criminalist that there are two possible alternatives whenever there is no ABO blood grouping found on a sample. Either there was not enough semen in the sample to get a valid test result; or the semen donor is a nonsecretor, a person whose blood type is not secreted into his body fluid. (Pet. App. C28-29, D22-23, D36).

Although the defense expert did not test the State's samples, he did test samples from the Respondent's blood and saliva and concluded that the Respondent was a blood type A secretor. (Pet. App. D20-21). The defense criminalist testified in a general way about the effect of time, temperature and bacterial contamination on the reliability of ABO blood group test and P-30 protein quantitative analysis. (Pet. App. D15-D18). He testified that he felt either alternative was possible (Pet. App. D24); that even if the State had done a quantitative test on the semen samples and found a large enough quantity to do an ABO blood group test, the results might still be equivocal. (Pet. App. D39-40).

The defense criminalist also testified about the acid phosphatase test. He testified that the acid phosphatase level in semen is fairly stable for years in the dried state even though it may lose some activity. (Pet. App. D16). Apparently, this test could still be done.

The defense criminalist also spoke generally about the PGM enzyme test. The defense criminalist did not identify the Respondent's PGM type. If the semen sample is too diluted the PGM will not be accurate. (Pet. App. D11).

Through methods designed to elicit information from young witnesses,[2] the police developed the following description of the assailant, which they used to compile a composite sketch: a black male between the ages of twenty-five and thirty, approximately five foot eleven, a hundred

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[2]Officer Levitt explained the techniques he used to get a description from the boy to the jury. TR. 2/6/85, 36-37.

and seventy pounds, with black hair, dark eyes, a medium build, medium complexion and one eyeball that was almost all white.[3] This description matched the Respondent. The composite drawing also matched the Respondent except that the drawing had the disfigurement in the right eye. The Respondent has a left eye which is almost all white. The officers and the boy's mother all testified that the boy could not remember whether the disfigurement was in his assailant's right or left eye.[4] In fact Sergeant Muehle

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[3]Testimony of Gerri Cady, TR. 2/6/85, 12.

[4]Officer Cady testified:

A. . . .Then he indicated that he had one of his eyes was white but he wasn't sure which eye it was.

Q. All right. At that time he knew for sure that there was one eye that was white?

A. Yes.

Q. He was unable to tell you whether it was the left eye or the right eye?

A. Right. He wasn't sure which one.

TR. 2/6/85, 12.

Officer Levitt testified:

A. That was an imperfection in an eye.

Q. Was he able to tell you which eye it was at that time?

A. No, he wasn't.

TR. 2/6/85, 37.

And on cross examination:

Q. Isn't it true that David Leon told you that he thought that the rapist had a bad eye, that he wasn't positive but that he thought the bad eye was the rapist's right eye?

A. That's absolutely not true.

TR. 2/6/85, 49.

See also, TR. 2/7/85, 22.

testified that he was the one who colored in the right eye on the composite drawing because the boy was unable to tell him which eye was defective.[5] The boy testified that he may have said he thought, but wasn't positive, that it was the right eye which was affected. The boy described the assailant's hair as greasy or shiny and curly. All he remembered about the Youngblood's clothing was that he had on brown socks and slip-on style shoes.

Based on the description provided by the boy, Detective Lingle of the Tucson Police Department put together a photo line-up. The photo line-up consisted of six black men. On three of the pictures police had blocked out the right eye and on three the police had blocked out the left eye. The detective went to the boy's school on November 7, 1983, one month before Youngblood was ever located. Detective Lingle told the boy that the person who assaulted him may or may not be in the pictures.[6] The boy looked at each picture very closely and said he was pretty sure it was number three. Immediately thereafter he said he was real sure.

The boy held the pictures close to his face when he made the identification, prompting the detective to ask him if he wore glasses. The boy said he did, got his

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[5]Testimony of Sergeant Muehle, TR. 2/5/85, 132.

Q. How were you able to determine where to place, you know, in which eye to put the whiteout?

A. David was unable to tell me whether it was the right or the left eye. And I simply put some whiteout in the right eye as a random choice.

[6]Testimony of Detective Lingle, TR. 2/6/85, 80.

glasses, and again identified number 3, Larry Youngblood, as his attacker.[7] At no time did the boy identify anyone but Larry Youngblood as his attacker.

The boy described the assailant's house as sparsely furnished; basically a table, chair and bed. The description of the house fit the description Youngblood's girlfriend gave police about Youngblood's house.[8] The house was never located by police.

The boy also provided a description of the assailant's car. He said it was white, medium size, with torn seats covered with a blanket, junky and "garbagie" inside.[9] Although the boy did not understand the terms two-door

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[7]Testimony of Detective Lingle, TR. 2/6/85, 81. Defense counsel attempted to dilute the boy's identification of the Respondent by pointing out that the boy did not have his glasses on the night he was attacked. The boy's eye doctor, who was called by the defense, testified that without his glasses the boy can still see faces clearly, obtain an Arizona driver's license, and play ball. Testimony of Dr. Ignelzi, TR. 2/7/85, 78.

[8]Where the Respondent lived at the time was a contested matter. The Respondent's girlfriend told police that he had not lived with her for the last six months. She said that the house he did live in had been burglarized and that all that she could remember about the furniture was it had a bed. Testimony of Detective Lingle, TR. 2/6/85, 88-94.

At trial the Respondent and the girlfriend testified that they were living together in her house at the time of the assault, and that they were home together on the night of the crime, October 29, 1983.

Defense counsel argued in closing that in order to find the Respondent guilty beyond a reasonable doubt, the jury would have to find that the girlfriend perjured herself on the Respondent's behalf. Defense Counsel's Closing Argument, TR. 2/8/85, 71. The jury verdict infers such a finding.

[9]Testimony of Detective Lingle, TR. 2/6/85, 91.

or four-door car, he described a car with four doors.[10] Police recovered a car that had the Respondent's fingerprint in it. The car fit the boy's description. The boy was able to identify both a photograph of the car and the blanket which was found inside.

At trial the boy testified that he was able to see his assailant, had a good chance to look at his face, and, based

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[10]The boy testified:

> A. It was a white—I don't know what kind of car it was. But it was white and it had one—two doors on each side. Two door. TR. 2/6/85, 233.

The defense claimed that the boy had described a two door car based upon what the boy had told others.

> Q. He told you it was a big white vehicle?
>
> A. Yeah.
>
> Q. All right. Were you able to ascertain how many doors the vehicle had?
>
> A. That was of concern to me and I did attempt to. I asked him how many doors it had and there would be a pause and he wasn't sure. And I would say was it a two-door or a four-door? And he would think.
>
> I said, well, two-door or four-door? Was it a two-door? And he would say he wasn't sure. I said, well, could you push the seat forward? That's a common thing in a two-door car, you can push the seat forward. I thought that might be something he would remember.
>
> He said he thought you could push the seat forward. That's how I determined it was a two-door car.

Testimony of Officer Levitt, TR. 2/6/85, 38-39, See also Testimony of Officer Levitt, TR. 2/6/85, 53; and TR. 2/7/85, 26.

on that experience and the time he had to look at the assailant, he was positive Larry Youngblood was the man who raped him. The Respondent was identified in court by the victim.

At trial the defense challenged the credibility of the boy and complained about the state's handling of the semen samples. The Respondent testified in his own behalf and presented an alibi defense.

The trial judge instructed the jury on identity, alibi and destruction evidence:

> "In addition to showing the commission of this offense, it is necessary and incumbent upon the State to prove beyond a reasonable doubt that the defendant was the one who committed it. If you entertain any reasonable doubt as to the question of the identity of the person who committed the crime, then you are compelled to find the defendant not guilty.
>
> The defendant has introduced evidence that he was not present at the time and place the alleged crime was committed. This is a legal and proper defense. If you have a reasonable doubt as to whether the defendant was present at the time and place the alleged crime was committed, you must find the defendant not guilty.
>
> Before returning a verdict of guilty, you must be satisfied beyond a reasonable doubt that the in-court identification was independent of the previous pretrial identification or, if not derived from an independent source, you must find from other evidence in the case that the defendant is the guilty person beyond a reasonable doubt.
>
> If you find that the State has destroyed or lost, caused to be destroyed or lost or allowed to be destroyed or lost any evidence whose content or quality

are in issue, you may infer that the true fact is against the State's interest."

(R.T. of Feb. 8, 1985, at 89-90).

Defense counsel argued these instructions throughout her closing argument. The defense counsel argued that the real assailant was a nonsecretor. The defense counsel told the jury that there were 25 different reasonable doubts.[11] The jury rejected all these arguments and found

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[11]The Defense claimed a number of inconsistencies created the doubt. These facts were presented to the jury in an attempt to establish a reasonable doubt on the issue of identity.

The boy's testimony that his assailant's hair was greasy and black with some gray in it while the Respondent has black hair with no gray;

The boy's testimony that the assailant wore slipper style shoes versus the Respondent's testimony that he only wears cloth tie-up shoes due to callouses on his feet;

The boy's recollection of brown socks versus the Respondent's claim that he only wears black, blue or gray socks;

The boy testified that the assailant was not wearing glasses. Larry Youngblood testified that he always wears glasses to hide his disfigured eye. Other defense witnesses testified that the Respondent wears glasses anywhere from fifty-percent of the time to always;

The boy's eye doctor's testimony that the boy did not need his glasses in order to recognize faces versus the Respondent's supposition that the boy has serious trouble with his eye sight;

That the boy did not mention the Respondent's widow peak, the scar on his forehead or his limp;

That the prosecution witnesses testified that the boy said the assailant was in his thirties and used the term middle age versus the fact that the Respondent is thirty;

The prosecution witness' testimony that the boy could not remember which eye was afflicted. The defense's assertion that the boy was pretty sure it was the right eye.

(Continued on following page)

the Respondent guilty. The jury resolved the factual questions concerning the testing and the identification of the assailant. On February 8, 1986, the jury convicted the Respondent on all three charges.

On appeal, the Respondent claimed for the first time that the charges should have been dismissed for the failure of the state to preserve and test the semen samples. The Arizona Court of Appeals agreed and ordered the convictions dismissed. The Arizona Court of Appeals disregarded the fact finding of the jury and found there was a reasonable doubt about the identity of the assailant. In doing so the Court of Appeals adopted the reasonable doubt arguments rejected by the jury. The Arizona Supreme Court denied review. This Court granted the State's Petition for Certiorari on February 29, 1988.

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SUMMARY OF ARGUMENT

The Arizona Court of Appeals has created a new rule requiring police to preserve and to test evidence for criminal defendants. The Arizona Court of Appeals reached this result by a series of unwarranted extrapolations from *Brady v. Maryland*, 373 U.S. 83 (1963) which the court now justifies by a misinterpretation of *California v. Trom-*

(Continued from previous page)

The jury was in the best position to resolve the inconsistencies in the testimony: they had the opportunity to observe the physical appearance of the Respondent and judge the credibility of all the witnesses.

betta, 467 U.S. 479 (1984). The Arizona Court's have interpreted Brady as requiring that police preserve breath sample obtained from intoxicated drivers. This interpretation requires no showing that the breath sample was constitutionally material. The only showing required is that police can retain the sample as a mere incident to procedures they routinely perform. In the instant case the Arizona Court applied this line of reasoning to where police had obtained other evidence. The court below found that the State's preservation and testing of semen samples obtained from the rape victim was improper. Relying upon *California v. Trombetta*, the court below ordered that the convictions must be dismissed. The Arizona courts have misconstrued this Court's decisions. Under this new rule defendants may obtain dismissals of their convictions by simply speculating about the State's failure to completely fulfill its new obligations. The materiality of the evidence, in any constitutional sense, has vanished. The Arizona rule has no constitutional basis and operates to eliminate the adversary and jury system as a means to ascertain the truth. The rule places impossible burdens upon police and undermines the strong interest in the finality of judgments.

ARGUMENT

THE RULE CREATED BY THE ARIZONA COURT OF APPEALS WHICH REQUIRES THE STATE TO PRESERVE AND TEST EVIDENCE FOR DEFENDANTS WITHOUT A SHOWING OF MATERIALITY IS CONTRARY TO THE CONSTITUTION. THE NEW RULE PLACES IMPOSSIBLE BURDENS ON POLICE AND ELIMINATES THE ADVERSARY PROCESS AND JURY SYSTEM AS MEANS TO ASCERTAIN THE TRUTH.

The analysis of the Arizona Courts in the creation of an affirmative duty on police to preserve and test items for defendants has been a series of unwarranted extrapolations from *Brady v. Maryland*, 373 U.S. 83 (1963), now justified by a misinterpretation of *California v. Trombetta*, 467 U.S. 479 (1984). The Arizona rule has no constitutional basis in the Due Process Clause and operates to eliminate the adversary and jury system as a means to ascertain the truth. Under this new rule defendants may obtain dismissals of their convictions by simply speculating or complaining about the State's failure to completely fulfill its newly created obligations.

In *Mooney v. Holohan*, 294 U.S. 103 (1935), this Court held, for the first time, that a prosecutor's knowing use of perjured testimony could constitute a violation of due process. "Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." 294 U.S. at 112. And *See, Pyle v. Kansas*, 317 U.S. 213 (1942); *Napue v. Illinois*, 360 U.S. 264 (1959).

In *Brady v. Maryland*, 373 U.S. 83 (1963) the state prosecutor obtained the death penalty by withholding from the defendant a confession that police had obtained from his accomplice. The confession diminished the defendant's culpability in the murder and could have affected the jury's imposition of the death sentence. This Court found that due process was violated in *Brady* just as if the prosecutor knowingly presented perjured testimony to the jury. 373 U.S. at 86-87. Essential to *Brady* was the materiality of the evidence. The confession was material only to punishment and not to guilt. Therefore, it was the punishment phase and not the entire trial which was lacking in due process. 373 U.S. at 88-90. *United States v. Agurs*, 427 U.S. 97, 105-106 (1976).

The purpose of the *Brady* rule "is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." *United States v. Bagley*, 473 U.S. 667, 675 (1985). "By requiring the prosecutor to assist the defense in making its case, the *Brady* rule is a limited departure from a pure adversary model." *Id.* at n6. Accordingly, this Court has consistently and repeatedly stated that the prosecutor is under no constitutional obligation to turn over his complete file to the defense, or to even make a detailed accounting to the defense of all police investigatory work on a case. 473 U.S. at 675; *California v. Trombetta*, 467 U.S. 479, 488 n8; *United States v. Agurs*, 427 U.S. 97, 106 (1976); *Moore v. Illinois*, 408 U.S. 786, 795 (1972).

The Arizona extrapolation from *Brady v. Maryland* began in *Scales v. City Court of Mesa*, 122 Ariz. 231, 549 P.2d 97 (1979). There the defendants were arrested for

driving while intoxicated and forced to submit to a breathalyzer test. In the breathalyzer test, the suspect's breath reacts with certain chemicals than can be saved for retesting by a defendant. In keeping with their customary procedure, the police destroyed the chemicals after they got the test result. The Arizona Supreme Court rejected any suggestion that the police acted in bad faith. 122 Ariz. at 234. The Court found that since this coerced test provides the state with a statutory presumption of guilt, *Brady v. Maryland*[12] required that the chemicals be saved to allow the defendant to rebut the presumption of guilt. *Id.* The remedy for not saving the chemicals was suppression of the breath test results and thus cancellation of the presumption of guilt. The *Scales* court followed the line of cases which held that the failure to preserve the breath sample is tantamount to suppression since preservation of the samples can be accomplished as a mere incident to the procedure. 122 Ariz. at 233 n1.

In *Baca v. Smith*, 124 Ariz. 353, 604 P.2d 617 (1979) the court faced the same statutory presumption of guilt problem with a different breath testing device, the intoxilyzer. The intoxilyzer did not reduce the breath sample to a preservable form comparable to the chemicals in the breathalyzer. The *Baca* Court relied upon the due process concerns of *Scales* and held that if police force a

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[12]The *Scales* court framed the issue as follows: "Petitioners' first claim is that the fourteenth amendment due process clause, U.S. Const. Amend. XIV, as interpreted in *Brady v. Maryland, supra,* requires that police officers retain the test ampoule so that it may be inspected by petitioners." 122 Ariz. at 233 (footnote omitted). The court held "In light of the obvious importance to the petitioners of being able to rebut the presumption of intoxication we hold that destruction of the ampoule was prejudicial to the defense." 122 Ariz. at 224.

suspect to submit to an intoxilyzer test, he must be given a separate sample of his breath for independent testing if he so desires. The *Baca* decision also relied upon the "mere incident to the procedure" rationale. 124 Ariz. at 355.

In *State v. Mitchell,* 140 Ariz. 551, 683 P.2d 750 (App. 1984), the Arizona Court of Appeals made a quantum leap from the *Scales* analysis. The *Mitchell* court applied the "mere incident to the procedure" reasoning to a situation where no suspect had yet been arrested. This duty to preserve and test evidence was invoked where the evidence was not coerced from a defendant in order to invoke a statutory presumption of his guilt. The court found that since the state could preserve evidence they must. The Court extended the rationale and found *Brady* to require the suppression of blood-group evidence where police did not refrigerate a semen sample obtained from a rape victim.[13]

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[13]The *Mitchell* court framed the issue as:

> "The facts here raise two questions. Did due process principles as set out in *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), require the police to refrigerate the semen slide and if so, whether the failure to do so mandates a reversal or dismissal of count one. We believe that the first question is answered by *Scales v. City Court of Mesa,* 122 Ariz. 231, 594 P. 2d 97 (1979). There the court held that the test ampoule used in the Breathalyzer must be retained so that it can be tested by defense.
>
> So too in the case of semen samples." 140 Ariz. at 555.

The *Mitchell* court also answered the second question by relying on *Scales:*

> "The failure of the State to preserve a semen sample did not merit dismissal of count one but only the suppression of any blood grouping evidence. See *Scales v. City Court of Mesa, supra.*" 140 Ariz. at 555.

In *California v. Trombetta,* 467 U.S. 479 (1984), this Court noted that the "access-to-evidence" decisions turn upon the underlying fairness of the government procedures, 467 U.S. at 490 n11, the good faith of the government officials, *Id.* at 487-88, and the constitutional materiality of the evidence, *Id.* at 488-89. In *Trombetta,* the underlying fairness of the California procedures called into question were the same as in *Scales* and *Baca*: the failure of the state to collect and preserve breath samples.[14] The California Court of Appeals found that the test results should have been suppressed, stating that "the failure of the State to collect and preserve the evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by state agents,

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[14]The California police stopped the Defendants for suspicion of driving while intoxicated. The police invoked the implied consent law which required these suspects to produce evidence of their intoxication. The Defendants were forced to submit to a test to determine their blood-alcohol concentration or face the loss of their driving licenses. 467 U.S. at 482, n2. Under California law the defendants were given the choice of submitting to a blood test, a urine test, or a breath test. Id. If the defendants had elected to submit to a urine or blood test the State would have automatically saved samples for retesting by the defendants. 467 U.S. at 490, n11. However, the defendants were not informed of this difference when they were asked to select among the three types of tests. *Id.* Nor were the defendants informed of their right under state law to have a second test conducted by independent experts. *Id.* The defendants submitted to a breath test. The breath test the police used, the intoxilyzer, did not reduce the breath samples to any preservable form. 467 U.S. at 481-82 and 467 U.S. at 484, n5. The defendants were then arrested for driving while intoxicated. Because of the test results, the defendants were presumed to be intoxicated and thus presumed guilty under state law. 467 U.S. at 482. Since collection of the breath sample was technically feasible and would have allowed the defendants to challenge the test results, the defendants argued the test results should be suppressed.

is tantamount to suppression of the evidence." *People v. Trombetta,* 142 Cal. App. 3d 138, 190 Cal. Rptr. 319, 323, quoting *Garcia v. Dist. Court,* 21st Jud. Dist., 197 Colo 38, 589 P.2d 924, 930 (1979). This Court reversed, stressing that the police had "acted in good faith and in accord with normal practices". 467 U.S. at 487-88. This Court also found that the breath test failed the two prong test for constitutional materiality: apparent exculpatory value and the non-availability of comparable evidence. 467 U.S. at 488-91.

In *State v. Escalante,* 153 Ariz. 55, 734 P.2d 597 (App. 1986), the Court merged the *Mitchell* rationale with the rationale of *Trombetta.* This was so even though *Trombetta* was a reversal of the "incident to procedure" rationale of *Mitchell.* The *Escalante* court found, relying on *Trombetta,* that it was clear that the state had a duty to preserve semen stains gathered from rape victims. 153 Ariz. at 60. The court, however, found a new remedy for this failure. The court found the suppression remedy was not appropriate because there was no evidence derived from the semen sample. *Id.* The court ordered that all the convictions be dismissed.

In the instant case, the Arizona Court of Appeals also applied this rationale. Relying on *Mitchell, Escalante* and *Trombetta,* the Court of Appeals ordered that Respondents convictions be dismissed because, in the courts view, the police improperly preserved and tested the semen samples obtained from the rape victim.

In reaching its result the Arizona Court of Appeals misinterpreted *Trombetta* in two respects. First, the lower court translated *Trombetta* into a case establishing new duties upon police to take affirmative steps to

gather, preserve and test evidence for criminal defendants. A possible basis for such a misinterpretation is the following statement in *Trombetta;*

> We have, however, never squarely addressed the government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants. 467 U.S. at 486.

It could appear that after this statement *Trombetta* then proceeded to "squarely address" the issue. However, while this Court did address the standard of materiality, this court did not change the nature of the adversary system. This Court made it very clear that it was not creating new affirmative duties for police. This court held:

> *Whatever* duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, see *United States v. Agurs,* 427 U.S., at 109-110, 49 L.Ed.2d 342. 96 S.Ct. 2392, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Neither of these conditions is met on the facts of this case. 467 U.S. at 488. (emphasis added).

The footnote to this first sentence explains that no new duties were being created:

> In our prosecutorial disclosure cases, we have imposed a similar requirement of materiality, *United States v. Agurs,* . . . ., and have rejected the notion that a 'prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel.' . . . .); see also *Moore v. Illinois,* . . . . ('We know of no constitutional

> requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case'). *Trombetta*, 467 U.S. at 488 n8. (citations omitted)

Trombetta did not create new disclosure or preservation duties upon police. *Trombetta* simply held that whatever duties the police had it was limited to evidence which was constitutionally material. Thus, *Trombetta* stated only "well-settled propositions". 467 U.S. at 492 (Justice O'Connor, concurring).

The lower court's second misinterpretation of *Trombetta* involves the standard of materiality. The Arizona Court of Appeals simply created its own definition of constitutional materiality. According to the Court of Appeals, the appropriate standard is:

> . . . . that when identity is in issue at trial and police permit the destruction of evidence that could eliminate a defendant as the perpetrator, such loss is material to the defense and is a denial of due process. Dismissal is the appropriate remedy unless the evidence is so strong that a court can say beyond a reasonable doubt that the destroyed evidence would not have proved exonerating.
>
> 153 Ariz. at 54, quoting, *State v. Escalante*, 153 Ariz. at 61.

There is no standard of materiality in this test. If identity is in issue then the loss of evidence equals "materiality" which requires dismissal. This is the "incident to procedure" rationale. The defendants in the breath sample cases had only to identify a situation. Similarly, in the instant case, the Respondent need only complain and speculate about a situation.

The Arizona Court of Appeals new test is purportedly limited to cases where identity is in issue. But identity is always in issue since the State has to prove, in every case, that a particular person, the defendant, committed the charged crime. Identity is always an element of the State's case which it has to prove beyond a reasonable doubt. Whenever a defendant pleads not guilty, identity is an issue for the jury. If the rule contemplates more, it requires only that the defense attorney make an argument to the jury about identity. The rule contemplates an unconvincing argument, because if the jury is persuaded by it, they will return a not guilty verdict and the issue becomes moot. This rule predicts the failure of the adversary and jury system to determine the truth.

The Arizona rule substituting speculation for materiality is contrary to law. In *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), this court rejected a "conceivable benefit" test for materiality because the test "is limited only by the imagination of defense counsel". 458 U.S. at 866-67. Similiarly in *United States v. Agurs*, *supra*, this Court stated "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." 427 U.S. at 109-10. In *Trombetta* this Court relied upon *Valenzuela-Bernal* and *Agurs* in applying the materiality standard. In *Trombetta* this Court adopted a standard of materiality similar to the *Agurs* standard. Speculation is insufficient to meet the standard of apparent exculpatory value established in *Trombetta*. *United States v. Binker*, 795 F.2d 1218 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 1287 (1986); *United States v. Fletcher*,

801 F.2d 1222 (10th Cir. 1986); *United States v. Webster*, 750 F.2d 307 (5th Cir. 1984), *cert. denied*, 471 U.S. 1106 (1985).

In the instant case the defense expert only speculated about what tests could be performed and then complained about the State's failure to do the testing. The defense expert speculated about what the semen samples may or may not contain. The expert speculated about possible disintegration of the samples. The samples may have been contaminated by bacteria. The Respondent did not raise the issue of suppression of evidence at the trial court because this would have eliminated his reasonable doubt argument about the testing. The speculation by the expert is insufficient to meet the apparent exculpatory value test.

The rule of the Arizona Court also eliminates the need of a defendant to demonstrate the second prong to the *Trombetta* standard: that the defendant could not obtain comparable evidence by other means. The Respondent had other comparable means in that he could perform further testing. The Respondent did not attempt to do any testing. The Respondent's other comparable means to show that the semen was not his, was to show that he was not the semen donor. The Respondent used every available means to do this at the trial including cross-examining all the State witnesses, presenting an alibi defense, contesting the identification and complaining about the testing. The Respondent's trial demonstrates that he had and used, other comparable means to demonstrate that he was not the semen donor. The Respondent has not met the standard of constitutional materiality.

Nothing the police did in the instant case could constitute a due process violation. Indeed, it is difficult to see how a due process analysis is even invoked. The Due Process Clause of the Fourteenth Amendment prohibits the State from unfairly interfering with the Defendant's access to evidence material to his defense. *California v. Trombetta, supra. Trombetta* recognized that to some extent the "access-to-evidence" cases turn on the underlying fairness of governmental procedures". 467 U.S. at 490 n11. In *Trombetta* there was sufficient state action in a variety of ways to trigger a due process interference. Although there was government action that put the fairness of the government procedures in question, this Court found that the evidence interfered with was not constitutionally material. *See also, United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982).

In the instant case, the police did nothing to interfere with the Defendant's access to evidence. The Respondent was free to examine the samples. The Respondent was also free to not examine the samples and attempt to create a reasonable doubt by inferring to the jury that further testing would prove exonerating. Nothing was compelled from the Respondent. It was, after all, the Respondent who knew if the sample would prove exonerating. There is no requirement that the defendant access the evidence. Nor is it a requirement that the State keep the evidence at any particular temperature. The fundamental fairness of the government's procedure is not in question; therefore, there is no due process violation.

The police acted in good faith. In *California v. Trombetta, supra,* this Court based its decision on the grounds that the police had acted in good faith, *Killian v. United*

States, 368 U.S. 231 (1961), and that the destroyed evidence did not meet the standard of constitutional materiality. The *Trombetta* Court did not decide whether good faith, standing alone, would have supported the decision. Absent a showing of bad faith or connivance on the part of the government in destruction of evidence there can be no due process violation. *See, United States v. Augenblick,* 393 U.S. 348, 352-56 (1969); *United States v. Loud Hawk,* 628 F.2d 1139, 1153-54 (9th Cir. 1979) (Kennedy J. concurring joined by majority of *en banc* court), *cert. denied,* 445 U.S. 947 (1980). It is clear, in the instant case, that the police acted in good faith and in conformance with their normal procedures. See *Trombetta, supra; Kuiian, supra.* The police had no obligation to gather a swab from the victim's anus or to seize his garments. The police preserved these items, and even refrigerated the anal swab. The only person who examined the evidence, the police criminalist, found that there was not enough semen available for analysis. The police were not even able to obtain a sample from the Respondent for comparison. There is no police action in this case which triggers a Due Process analysis.

The Arizona Court of Appeals rule is contrary to the due process principles it purports to apply. The Arizona courts new rule eliminates the function of the jury in the truth seeking process. The Arizona Court of Appeals has violated the fundamental concept that the jury is the trier of facts. In this case, the jury was given clear and forceful instructions on identity, alibi and destruction of evidence. Respondent was found guilty beyond a reasonable doubt. The jury decided the issues regarding identity and alibi. The jury also decided the materiality of the

semen samples. The determination of the trier of fact should not be overturned on such issue. See *Agurs, supra.* On appeal the Court of Appeals rejected the fact finding of the jury.

An interpretation of *Brady* to require a broad rule of discovery would drastically "alter the character and balance of our present systems of criminal justice". *United States v. Bagley,* 473 U.S. 667, 675 n7 (1985) quoting *Giles v. Maryland,* 386 U.S. 66 (1967) (dissenting opinion). "Furthermore, a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden upon police and would undermine the interests in the finality of judgement". *Id.* at n7. The creation of such a broad right of discovery would result in the creation of an unwieldy national attic" which "would not advance the cause of justice". *United States v. Spencer,* 618 F.2d 605, 607 (9th Cir. 1980).

Imposing such a duty upon police at the investigatory stage would impose an impossible burden. The police have no interest to destroy evidence at the investigatory stage. There can be no animus for a person yet identified. At that stage the same evidence that inculpates, exculpates. Nor can the police be expected to know what evidence is important at the beginning of an investigation. Everything has the potential to be valuable evidence. The Arizona rule allows the defense to discover every piece of evidence and then create hypotheticals about the "one missing piece". Police may not even learn about exculpatory value until the defendant takes the stand. What police will be found to have done wrong is only limited by

the defense counsel's imagination. Such a rule deters police from action. As long as they do not collect evidence they do not risk dismissal. One essential function of the police is to release the innocent as well as convict the guilty. A rule that deters the gathering of evidence hampers the search for the truth. A defendant has no right to force the State to gather and preserve evidence before he is a defendant. When a suspect becomes a defendant, he has a right to access the evidence. In this case the Respondent did not have his right to access evidence violated. The police can not be expected to employ technology they do not have. Nor should they be obligated to perform every available test, absent a request from the defendant. The decision of the Arizona Court of Appeals should be reversed.

CONCLUSION

The Arizona Court of Appeals has created a new rule requiring that police preserve and test evidence for Defendants. The Arizona Court of Appeals created this right by misconstruing this Court's decisions. The Arizona Court of Appeals has transformed the standard of materiality into a standard of speculation. This new rule has no basis in the Constitution. The rule drastically affects the adversary system and jury trial as methods of determining the truth. Such a rule places impossible burdens upon police and undermines the interest in the finality of judgement. The Arizona Court of Appeals should be reversed.

Respectfully submitted,

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RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
MAY 25 1988

No. 86-1904

In The

Supreme Court of the United States

October Term, 1987

STATE OF ARIZONA,

Petitioner,

vs.

LARRY YOUNGBLOOD,

Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Where strong evidence of misidentification is apparent at the time of an arrest for rape, does the government deny the accused citizen of Due Process under the Fourteenth Amendment to the United States Constitution when it monopolizes control of the attacker's semen samples and allows them to deteriorate beyond forensic usefulness by failing to simply refrigerate those samples?

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ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO

BRIEF FOR RESPONDENT

STATEMENT

On the evening of the rape, police began an investigation that focused on identifying the assailant. Two sources of information were collected: the victim's description and semen samples found on clothing and in the boy's body.

The Court of Appeals noted a few of the discrepancies between the description given by the victim and

characteristics of Mr. Youngblood. The observant youngster told how he had been attacked by a

> "middle-aged . . . .black man named Damian or Carl who had greasy grey hair, facial hair, no facial scars, and whose right eye, to David's best recollection, was almost completely white. His assailant wore brown leather or plastic loafers and drove a white medium-sized, two-door sedan with a passenger door that did not work." 153 Ariz. at 50-51.

By contrast, "Larry Youngblood is a thirty-year old black male who has dry black hair, a scar on his forehead and a bad left eye. He wears cloth-laced shoes and walks with a noticeable limp . . . ." 153 Ariz. at 51. "He always wears glasses in public." Id.

The rapist drove "a medium-sized, two-door sedan with a trashy interior and a noisy muffler. He [the victim] testified that the car started with an ordinary ignition key. He also testified that there were blankets or sheets on the seats of the car but that he was not able to see them because the car was dark. The car radio was playing country music. The assailant told David the passenger door did not work." Id. On the other hand, "Six weeks following the assault, the police seized Larry Youngblood's 1964 white, four-door Chrysler Imperial . . . towed it to the station, took pictures of the car and dusted it for fingerprints. It was also examined for clothing and hair fibers." Id. The police disposed of the car without notice to Mr. Youngblood or his lawyer, but

> "(p)rior to this time, they did not determine whether the radio worked, if the ignition switch worked with a key, what channel the radio was tuned to, if the muffler was noisy, or indeed whether the car was running at all.

> Youngblood and others testified that his car was not running at the time of the incident because of electrical problems and because it needed repairs. He further testified that he had removed the battery from his car to put in Alice Whigham's car. The car ran quietly when it was functioning and did not start with a key but with a screwdriver. The radio had not worked at all since he owned the car. The examination of the car failed to reveal any fingerprints, hair or clothing fibers from David; the only fingerprints were those of Youngblood." 153 Ariz. at 51-52.

Other discrepancies are found in the record. A composite sketch of the assailant was prepared the evening of the rape. The victim was satisfied with the accuracy of that sketch[1] and admitted that it did not resemble Mr. Youngblood.[2] It portrays a straight hairline, unlike Larry's widow's peak[3]; it fails to describe his ever-present sunglasses[4] or the scar on Larry's

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[1] Testimony of Officer Cady, Transcript of Proceedings, February 6th, 1985 at page 25, lines 8-10.

[2] Testimony of David Leon, Transcript of Proceedings, December 14th, 1984 at page 270 line 15 to page 272 line 2.

[3] 3 See, Testimony of Officer Cady, February 6th, 1985 at page 20 line 15 to page 22 line 5 and Defense exhibit E.

[4] See, Testimony of Officer Cady, February 6th, 1985 at page 23 line 2 to page 24 line 1; Testimony of Reserve Officer Levitt, Transcript of February 6th, 1985 at page 55 lines 1-17; Testimony of Arthur Albert King, Transcript of February 7th 1985 at page 67 lines 8-17; Testimony of Damon Beckett, Transcript of February 7th, 1985 at page 85 lines 3-9; Testimony of Alice Whigham, Transcript of February 7th 1985 at page 123 line 19 to page 125 line 4.

forehead.[5] Larry's automobile was larger than the type that the victim pointed out to his mother as "medium" in size.[6] Though the rapist played country music on his car radio, Larry 'despises' country music.[7] Starting Larry's car is a two-handed operation requiring the use of a screwdriver.[8]

When the boy was asked to pick out the blankets which he felt in his attacker's car, he did not select them from a group of blankets[9], and he did not touch them. He described how that selection was made:

> Q. And in fact, when Detective Lingel showed you that blanket, you figured that that was the blanket from the man Detective Lingel said she caught when she saw you at the school; isn't that right?

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[5] See, Testimony of Officer Cady, December 14th, 1985 at page 24 line 2-19; Testimony of Alice Whigham, Transcript of February 7th, 1985 at page 123 lines 7-11; Testimony of Larry Youngblood, Transcript of February 7th, 1985 at page 165 lines 8-13.

[6] Testimony of Patricia Leon, Transcript of February 7th, 1985 at page 27 lines 13-22.

[7] Testimony of Alice Whigham, Transcript of February 7th, 1985 at page 121 lines 7-19; Testimony of Arthur Albert King, February 7th, 1985 at page 63 lines 12-21.

[8] Testimony of Alice Whigham, Transcript of February 7th, 1985 at page 127 line 9 to page 128 line 5; Testimony of Larry Youngblood, Transcript of February 7th, 1985 at page 170 line 23 to page 172 line 11.

[9] Testimony of Detective Lingel, Transcript of February 6th, 1985 at page 119 lines 8-14.

A. Yeah.

Q. You figured why else would she be showing you this blanket; right?

A. Yeah. She showed me and I said yes, those are them. See, she was telling me – well, if I knew what colors. And I said I couldn't remember. Just like I can't describe the house very good.

But if they were to say is this the house, I would just say yeah. Because I've been there. I've been there long enough and I know what it is.

Q. You knew when she showed you the blanket that that was the blanket from the guy that she already told you they caught?

A. Yeah. Testimony of David Leon, Transcript of February 6th, 1985 at page 253 line 10 to page 254 line 9.

The police crime laboratory examined the clothing and found semen on them.[10] The amount of semen was determined, by the P-30 testing method,[11] to be insufficient to type. The clothing, unlike the swab, was not refrigerated[12], and the P-30 molecule deteriorates if not properly preserved[13] as do the other markers used to

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[10] Testimony of Edward Heller, Transcript of February 6th, 1985 at page 189 line 6 to page 191 line 4.

[11] Testimony of Edward Heller, Transcript of February 6th, 1985 at page 203 lines 12-20.

[12] See testimony of Keith Inman, Transcript of February 7th, 1985 at page 201 line 11 to page 202 line 9.

[13] Testimony of Keith Inman, Transcript of proceedings, February 7th, 1985 at page 193, lines 5-9.

identify the semen donor.[14] The best semen samples would ordinarily be found in the clothing.[15]

On appeal, Mr. Youngblood first asked that charges against him be dropped for failure to preserve the clothing for testing. The government voiced no objection to raising the issue for the first time on appeal, and addressed the issue on the merits. The Court of Appeals held that "(t)here is no doubt that prejudice to Youngblood occurred as the result of the state's inability to properly preserve the evidence." 153 Ariz. at 54.

SUMMARY OF ARGUMENT

The decision below requires only that police do what they intended to do when they gathered the semen samples: exercise reasonable care in their preservation. When that was not done, the Court of Appeals weighed the practical consequences of that failure. It found a reasonable probability that that evidence, if available, could have changed the jury's verdict. Since the evidence was gone forever, Mr. Youngblood could never receive a fair trial. After considering all other possible sanctions, the Court of Appeals properly concluded that dismissal was necessary to protect Mr. Youngblood's Due Process rights.

[14] Testimony of Keith Inman, Transcript of Proceedings, February 7th, 1985 at page 193, line 14 to page 194, line 7.

[15] Testimony of Keith Inman, Transcript of Proceedings, February 7th, 1985 at page 199 line 17 to page 200 line 25.

ARGUMENT

THE COURT OF APPEALS APPLIED PRINCIPLES ARTICULATED BY THIS COURT IN WEIGHING THE CONSEQUENCES OF PETITIONER'S FAILURE TO PRESERVE PLAINLY MATERIAL EVIDENCE. FINDING A REASONABLE PROBABILITY THAT THE SEMEN SAMPLES COULD HAVE CHANGED THE JURY'S VERDICT, DISMISSAL WAS NECESSARY.

The Court of Appeals held that "when a woman has been the victim of an attempted or actual rape and the police recover a semen sample of the assailant, the authorities must take reasonable measures to adequately preserve this evidence." 153 Ariz at 55. (quoting *People v. Nation*, 26 Ca1.3d 169, 176, 604 P.2d 1051, 1055, 161 Cal.Rptr. 299, 303 (1980). No witness ever denied the reasonableness of simple refrigeration or the obvious materiality of semen samples. The evidence was gathered with the use of a specialized "sexual assault kit".

Though the issue framed by the Petition for Writ of Certiorari goes to the materiality of semen samples in rape cases, the government has not cited a single witness who doubted the materiality or the need to preserve the evidence. It has cited no case that failed to recognize the materiality of semen samples in rape cases. In *Hilliard v. Spalding*, 719 F.2d 1443 (9th Cir. 1983):

> The materiality of a sperm sample in a rape case thus goes well beyond the Agurs 'reasonable doubt' requirement because it can be used to prove the defendant's innocence to a certainty. 719 F.2d at 1445.

When the investigation focused on Mr. Youngblood, it was known that he did not match the description given by the victim. This Court has declared the standard of materiality in these circumstances.

> "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *United States v. Agurs*, 427 U.S. 97, 112-113 (1976).

For that reason, the Court of Appeals required that Mr. Youngblood make a "clear showing of prejudice" from the loss of that evidence (153 Ariz. at 52-53) and found that he did so, 153 Ariz. at 54, on the same record that is before this Court. The Court of Appeals recognized the variety of sanctions available when evidence is lost. It applied a common-sense evaluation of the practical consequences of the loss. It surveyed decisions from Arizona and other jurisdictions and carefully distinguished between the different sanctions before ordering dismissal. That reasoning tracked the logic of this Court's decisions.

This Court held in *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982) that a Due Process violation arising

from government engineered loss of testimony required a showing of "reasonable likelihood that the testimony could have affected the judgment of the trier of fact." 458 U.S. at 874. In that case the defense "made no attempt to explain how the deported passengers could assist him . . . " (458 U.S. at 861) after "An Assistant United States Attorney concluded that the passengers possessed no evidence material to the prosecution or defense of respondent . . . ." Id. Mr. Youngblood has certainly demonstrated the questionable validity of the verdict and the reasonable likelihood that proper preservation of the evidence would have won his acquittal.

Like *Valenzuela-Bernal*, *California v. Trombetta*, 467 U.S. 479 (1984) involves a decision not to preserve evidence which had been analyzed in such a way that " . . . a dispassionate review . . . (of the evidence) . . . can only lead one to conclude that the chances are extremely low that preserved samples would have been exculpatory." 467 U.S. at 489. Here, the decision was made to gather and preserve the evidence so that it could be used to exclude potential suspects. In *Trombetta*, the evidence was equally available to both the government and the accused. By the time of Mr. Youngblood's arrest, the semen was beyond forensic usefulness.

Petitioner's claim that a requirement of reasonable care would "impose an impossible burden" on police and encourage them to abandon the hopeless effort of gathering evidence with reasonable care presupposes an ineptitude not proven on the record. The police did gather the evidence. They merely failed to use available methods to preserve it. Whether done innocently or viciously, the

purpose of dismissing the charges under these circumstances is not the "punishment of society for the misdeeds of a prosecutor, but avoidance of an unfair trial to the accused." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

CONCLUSION

The materiality of semen samples in rape cases is not subject to serious dispute. The police used a specialized sexual assault kit to gather that evidence in this case in hopes of excluding potential suspects. They failed to use reasonable care in preservation of that evidence.

Because a review of the evidence in the case showed clear prejudice to Mr. Youngblood from the loss of this evidence, a sanction was appropriate. Having found that Mr. Youngblood could not get a fair trial due to the loss of the evidence, he would not be subjected to trial again. It was only to protect his Due Process rights that dismissal was ordered.

Respectfully submitted this 25th day of May, 1988.

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